United States Court of Appeals

for the Second Circuit

APPENDIX

76 1436

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JERRY WINSTON, BROOME COUNTY AVIATION, INC., COMMUTER AIRLINES, INC., and THEODORE (TED) BELL,

Defendants-Appellants.

B
P/S

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

APPENDIX - VOLUME 6

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UNITED STATES COURT OF APPEALS
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

Plaintiff :

-against- : CRIMINAL NO. 75-CR-83

JERRY WINSTON, BROOME COUNTY AVIATION, INC., COMMUTER AIRLINES, INC., and THEODORE (TED) BELL, :

Defendants :

----------X

CONTINUATION OF PROCEEDINGS in above-entitled matter, came on before the United States District Court, Northern District of New York, at Auburn, New York, on June 15, 1976, at 11:00 a.m., before the Honorable Lloyd F. MacMahon, United States District Judge.

Volume XI

A P P E A R A N C E S:

The Honorable JAMES M. SULLIVAN, JR., United States Attorney, Northern District of New York, Federal Building, Syracuse, New York, by ARTHUR A. CHALENSKI, ESQ., Assistant United States Attorney, Of Counsel.

- and -

BECKER, CARD, LEVY & RICHARDS, P.C., 141 Washington Avenue, Endicott, New York 13760, Attorneys for Defendants Jerry Winston, Broome County Aviation, Inc., and Commuter Airlines, Inc., by RODNEY A. RICHARDS, ESQ., Of Counsel.

- and -

PAUL R. SHANAHAN, ESQ., Syracuse, New York, Attorney for Defendant Theodore (Ted) Bell.

THE COURT: Gentlemen, Proceed.

(Whereupon, the following proceedings were held before the Court, out of the presence of the Jury.)

MR. RICHARDS: Your Honor, may we interrupt this witness in order to put Mr. Bell on to lay a foundation for these exhibits?

THE COURT: All right. I don't know how you can lay a foundation with Mr. Bell. Have you thought about this?

MR. RICHARDS: He has the original of the resignation and discharges on all of these pilots.

MR. CHALENSKI: If they are just seeking to introduce the documents, perhaps that can be done after cross examination is completed.

THE COURT: I think we should -- well, to have an orderly procedure here, we should finish the cross examination of Mr. Winston. Afterall, he is the principle witness in this case.

MR. CHALENSKI: I have one additional question before the Jury comes in, and it involves the summation and the charge.

I didn't offer you a specific request, but this case does involve an indictment that involves a statute which is, as you are aware, it is not commonly

known around the country. Normally in the case of this nature, a prosecution by this office, the Defendant advises the Jury of the nature of the defense, that is, the degree of this offense. In this case, I would like to do that, in either my summation or I request you.

THE COURT: I don't understand what you are talking about.

MR. CHALENSKI: I request that the Jury be advised that the offense in this case is a misdemeanor. I could point that out --

THE COURT: (Interrupting) Any objection?

MR. SHANAHAN: I would assume that the only purpose in that is to suggest to the Jury that it is not an important matter, and normally, as Your Honor is aware, we do not get into the grade of the crime, and I don't think that that is a proper consideration, really.

THE COURT: Do you object to it?

MR. RICHARDS: I would.

MR. SHANAHAN: I would, too.

THE COURT: I don't think it is a proper consideration, but it might become so if you open up that door, or, you know, if you lay on this too heavily that this is a very serious crime, or in any way imply that if convicted, these people are going to ja

for long terms. If that sort of thing comes up, by the Defendant, it seems to me that you open a door, and I won't hesistate in the least to tell them that it is only a misdemeanor. Let's be guided, accordingly.

MR. CHALENSKI: Thank you.

(Whereupon, the following took place before the Court and the Jury.)

THE COURT: I am sorry for the delay. The courtroom had to be used by Judge Port on other cases this morning. We had to start a little late.

Gentlemen, proceed.

J E R R Y W I N S T O N

Called as a witness, being previously duly sworn, was further examined and testified as follows:

CROSS EXAMINATION

BY MR. CHALENSKI:

Q Mr. Winston, as we left yesterday, you were talking or saying that you decided to cut your staff back, on December 20th, 1974?

A That is correct.

Q Now, in firing the individuals, which have testified in this case, was your firing of them precipitated because of your decision to lay off, or were they fired notwithstanding that?

A I am sorry, would you say that again, sir?

You distracted me because you said that the individuals who testified -- we didn't fire all of them.

Q Mr. Slough, was he laid off, or fired or both?

A He was fired.

Q So he would have been fired notwithstanding your decision to lay off?

A No, as a result of our economic situations, he was fired. Laid off? I don't know what you mean by your definition of laid off or fired?

Q If you had not made a decision to lay off the employees, would Mr. Slough have been fired on October 2nd, 1974?

A Probably not.

Q But had you not made a decision to lay off so many employees, would Mr. Josephson have been fired on or about October 3rd, 1974?

A Probably not.

THE COURT: Let's start this thing right. Were all of these employees named in the indictment fired?

MR. CHALENSKI: Yes, Your Honor.

THE COURT: I am asking the witness.

MR. CHALENSKI: I am sorry.

THE WITNESS: There were.

THE COURT: Were they fired?

THE WITNESS: There are a lot of names

in the indictment of people who were not fired.

THE COURT: Well, the ones that remain in the specific counts.

BY MR. CHALENSKI:

Q That is Slough, Josephson, Baan, Sholl, Lamos, Williams, Larimore and Hummell?

A Yes, those were discharged.

Q Now, were any of those individuals discharged for reasons other than your decision to lay off co-pilots?

A Yes, they were.

Q Which individuals were they?

A Co-pilot Sholl, Co-pilot Williams, and Captain Lamos.

Q And the others were discharged pursuant to your decision to lay off?

A Yes.

THE COURT: You keep using 'lay off'. The witness said they were fired and that means discharged.

MR. CHALENSKI: Yes, Your Honor.

THE COURT: Laid off means that you go away awhile, and then come back. You should use good terminology here, Mr. Chalenski.

BY MR. CHALENSKI:

Q Did you ever recall those four employees, Mr. Slough, Mr. Josephson, Mr. Larimore, or Mr. Hummell?

A I did not.

Q And when you called them in and advised them that they were being fired, did you give them an opportunity to work any additional time?

A Well, I didn't call them in and, secondly, I can't answer that, whether they were discharged on the spot, or if they were told to complete the week. Normally our policy is --

Q (Interrupting) Mr. Winston, what did you do with these four individuals, not what your normal policy is.

A You mean Williams?

Q Did you --

A (Interrupting) Williams, Slough, Hummell -- which four?

THE COURT: Please answer the question.

THE WITNESS: I want to make sure that I answer you properly, sir. Please give me the names, rather than just say 'these.'

BY MR. CHALENSKI:

Q Mr. Slough, Mr. Josephson, did you give them the opportunity to work any additional time after October 3rd, 1974?

A I don't believe so.

Q Did you give Mr. Larimore and Mr. Hummell an opportunity to work additional time after they were fired?

A No.

Q Did you give Mr. Baan the opportunity to work additional time after he was fired?

A No.

Q There came a time when you and the Defendant Bell spoke at a meeting on October 10th, 1974. What conversation did you and the Defendant Bell have prior to that meeting concerning what was going to be said by each of you?

A There was no meeting on October 10th.

Q October 5th, I am sorry.

A Okay.

Q Same question.

A All right. You distracted me by giving me the wrong date, and will you reword it?

MR. CHALENSKI: Read the last question back.

(The previous question was read by the Reporter.)

THE WITNESS: None.

BY MR. CHALENSKI:

Q Did you know Bell's position on the union prior to the meeting of October 5th, 1974?

A I would say that I knew that he was opposed to the union coming in.

Q And did you determine that through conversations with

him?

A That was my feeling, with our conversations, and that was what I deduced from what he said.

Q Did you advise Bell that he would speak at that meeting on October 5th, 1974?

A I did not. That was completely voluntary.

Q Did you suggest that he should speak at that meeting?

A I did not.

Q Did you extend an invitation to him to speak at that meeting?

A I extended the invitation to everybody. Anybody at that meeting that had any comments, I asked: if you wish to stand up and ask questions, or say what you want to say.

Q At any time did the factor of a union coming in enter into your -- excuse me, strike that. The union coming in, does that affect the company economically?

A I felt it would.

Q And you were not aware of the union coming in on September 20th, 1974?

A No.

Q So your economic decisions were made solely on factors other than the union?

A Absolutely.

Q But by October 5th, 1974, you were aware that the union

was coming in?

A Yes, sir -- well, I wasn't aware that they were coming in. I saw the notice which indicated that there were pilots that were interested in bringing the union in. It was one of three or four different unions.

Q But as of October 5th, 1974, your decision to lay off pilots was made for independent reasons, other than the union coming in?

A That is what I said.

Q Did you tell that to the pilots?

A We didn't discuss it.

Q You testified yesterday that you found, on October 7th, 1974, that the Teamsters were the union that the pilots wanted?

A That is true.

Q And how did you find that out?

A I researched my records and found my notes.

Q Notes made when?

A On October 7th.

Q Okay. You made notes on October 7th, that you found the Teamsters were coming in that day?

A That is right.

Q And who told you that?

A My notes don't tell me who told me.

Q Does your recollection tell who told you?

A No, it doesn't.
Q Was it Mr. Bell?
A I said I don't know.
Q Was it one of your pilots?
A I said I don't know.
THE COURT: Well, perhaps it might refresh your recollection?
THE WITNESS: No it doesn't refresh it.
THE COURT: The suggestion might refresh your recollection.
THE WITNESS: I am sorry, it does not.
BY MR. CHALENSKI:
Q So that nothing I could say would refresh your recollection and it is totally lost?
MR. RICHARDS: I object to the form of the question.
THE COURT: Sustained. It is argumentative.
BY MR. CHALENSKI:
Q The tape recording, you previously testified is an accurate reproduction of what you said at the meeting of October 5th, 1974, is that correct?
A In part.
Q Except that it omitted the portion which you read to the Jury, is that right?
A Yes, and there are some parts that are distorted, and in

the transcript I feel it has some bad or incorrect words, but essentially your transcript gets the meaning, and the wording of what I said.

Q Government's Exhibit 33-a is a copy of the transcript. From that date, and did you review that transcript prior to it being offered in evidence?

A Well, sir, if you remember, we were ordered by the Court to go out and get this transcript straightened out, and we had two hours to do it. In order to do this, or accomplish this, we had two hours, and I was operating the machine, while our attorneys were listening to the tape. I did not get a chance, before it was submitted, to review the transcript.

Q Were you giving your attorneys directions as to what the proper wording on the transcript was, at that time?

A I am sorry, I don't understand you.

Q Did you tell your attorneys what you said, and whether the transcript was correct?

A I said it was correct in essence, but not necessarily in detail. There were some words that were different than what the tape said.

Q Did you tell your attorneys was the different words were?

A No, I didn't have time do that. I was given two hours to work it out by the Court, and as I say, I was working

the machine, while our attorneys were trying to write or transcribe the tape.

Q Did you not tell your attorneys what this word was, or that word was, while listening to that tape during the course of that meeting?

A I assisted, but I could not do a thorough job.

Q You did as thorough a job as you could in the time?

A Under the circumstances.

Q Mr. Winston, did you tell your pilots this, on page thirteen, 'you are all aware that we bid on citation, the contract with I.B.M. for citation, $850,000.00 for an airplane. I don't know if you know anything about economics. We got to go out and borrow it and then we owe it, and we have got to pay it back and if we don't pay it back they will come up and sell our airplanes off and we will be out of business, that is the way it works We have to go out and do that with the $850,000.00.'

A That is sound economics.

Q 'But I tell you right now with the news now, we put in a bid for it, and they have negotiated with us and they are hard and we have to stick our necks out further and further and I can tell you now that we can pull our necks right in and I am not going to do it all because of this news here. I am not going to expand. It is a fact. I am not going to buy that citation. I can't

afford to take that risk. The economic risk with an unstable organization internally that will try and dictate the economic policies of the company. I am just not going to do it.'

Did you say that to the co-pilots?

A Yes, I did, and --

Q (Interrupting) Mr. Winston, would you answer my question? Yes, was the answer to my question?

A Yes.

Q And did you tell the co-pilots, 'already I have indicated now, that we have the chance of converting three Navajos into two Chieftains. We want to order another Metro before the end of the year.'

MR. RICHARDS: May I have the page number?

MR. CHALENSKI: Page fifteen in the middle.

BY MR. CHALENSKI:

Q Did you tell your co-pilots that?

A I did.

Q And at that time you had already decided to put two Metros into mothballs?

A That is right. But as I explained before --

Q (Interrupting) You have answered my question, Mr. Winston.

Now, on page twenty-two, 'The banks have

given us the money --

MR. RICHARDS: What page?

MR. CHALENSKI: Page twenty-two.

MR. RICHARDS: Where?

MR. CHALENSKI: In the middle of the first continuing paragraph.

BY MR. CHALENSKI:

Q 'They', the banks, 'have given us the money to buy these airplanes and are willing to give us more providing the Metros that's already negotiated to buy the Metro and order before the end of the year. And if we might go into a thirty-passenger jet, I am sure it will be there provided that we have internal stability.'

A I remember something wrong with that statement but that is correct.

THE COURT: Nobody asked you if there was anything wrong with it. Nobody asked you anything, as a matter of fact.

THE WITNESS: I am sorry.

BY MR. CHALENSKI:

Q Are those statements correct?

A That is correct.

Q On page twenty-one, 'Here we are --

MR. RICHARDS: (Interrupting) Where is that?

MR. CHALENSKI: That is the seventh line.

BY MR. CHALENSKI:

Q 'Here we are, we have a stable business that is growing and we are growing, and the people inside are growing, those five co-pilots that grew into captains and getting captains' pay. Now we are looking ahead again. I see this depression as an eminent thing, and what do I have to do to plan ahead before it hits us. I am not seeing it today. I've seen it sometime back that it's coming.'

Then, there is some language about the ecology problem, and the forty percent sales down at Detroit, and then, 'In Flint, Michigan, where they make the Buicks, they have 30,000 people on the unemployment roles, 30,000. And not just people, but 30,000 families. Now, with such treacherous times, do we want to shake the ship here? Do we want to see if we can topple it over so we sink? And that's what this thing is. Instability, we can't afford for somebody to come in here and dictate to us what direction we have to take, what economic policies we should do.'

Is that correct?

A That is correct.

Q On page twenty-six, 'So don't regress.'

MR. RICHARDS: Where is that?

MR. CHALENSKI: The middle of the page.

BY MR. CHALENSKI:

Q 'Don't rock the ship. Keep us balanced. You are not going to get security with the union. You're liable to get a lot of problems. You're interests and our interests are together. You want to grow, we grow and we can't grow unless you grow. We have demonstrated this. If at no other time witnin the last four years -- (unintelligible). So we hope that you will understand and hope that you won't (unintelligible), just keep on growing, keep advancing and see if the present management operating the way it is, and has been, will keep us out of trouble, and keep the organization growing to move up and advance.' Is that correct?

A I said that

Q Did you tell your co-pilots that you had already made a decision to lay off seven of them?

A No, I didn't.

Q Did you listen to Mr. Bell's speech at that meeting?

A Yes, I did.

Q And you were present?

A Right up front.

Q October 7th, was two days after this meeting, correct?

A Yes.

Q Mr. Bell said on the bottom of page twenty-nine, 'You

are going to get a ballot and it's not going to read that way, but there is going to be two people running, one of them is Jimmy Hoffa and the other is me.'
Do you deny that at that time Jimmy Hoffa was the president at that time?

A At the time he said that, it made no impact on me. Whether I knew whether Jimmy Hoffa belonged to the Teamsters had nothing to do with the impact of that statement.

Q You don't deny that you knew Jimmy Hoffa was the former president of the Teamsters, is what I meant?

A I know that he was associated with the Teamsters.

Q Mr. Winston, I am handing you Government's Exhibit forty-one for identification (offering), which is a note from the file, the personnel file of Robert Slough and have you seen that document before (Offering)?

A It looks like one I have seen.

Q And when was the first time that you saw that?

A This document was made when we were reviewing -- in preparation for the trial.

Q And what time? What date was that?

A I wouldn't know what date it was.

Q 1975?

A Perhaps 1976. I don't know.

Q Did you hear Mr. Bell testify that he made this document

at about the time that you were discussing the firing of Robert Slough?

A I don't remember his saying that.

Q IF he did he was lying?

A I don't know.

Q It was not made in 1974, in any event?

A I can't place it. I know it was a summary of --

Q (Interrupting) Mr. Winston, was it made in 1974, in any event?

A I don't know.

Q Do you know that you were indicted in 1975?

A July of 1975.

Q Yes.

A I know I was. Yes, I answered your question, July of 1975.

Q .s was made before or after July of 1975?

A I don't know.

Q You have no recollection whether that document was made at any particular time between October or -- excuse me, September 30th, 1974 and the present day?

A I don't. I don't make items daily, and I am not about to memorize or computerize every item I do.

Q And did you begin to prepare for this trial before you were indicted?

A Did I prepare for the trial? I sure did.

Q This item referring to only three incidents regarding Robert Slough?

A May I see it again? You showed it to me and I didn't read it. I would like to read it.

Q Yes (Offering).

A Yes.

Q No, is it your testimony that this document is not complete, that there were additional reasons for which Robert Slough was fired?

A May I get my file on Slough?

Q Yes.

(The witness produced a file which he perused.)

A Yes, there was additional reasons.

Q Okay. The third item, Captain Reeve missed a schedule change and twenty-five minutes prior to flight time, the office was notified by first-officer Slough. That event occurred on September 30th, 1974, is that correct?

A That is what the record shows.

Q Okay. And an incident in June of 1974 on a Friday, and Mr. Slough was not scheduled to a specific flight. At 1500 a schedule change required his services. He was not available.

A If the record shows that was the time, I agree with it.

Q Does the record show what time?

A You have the record there, or part of the record, or a transcript or a summary of the record.

Q I am reading from this exhibit forty-one.

A All right, let me see it.

This was -- what period are you talking about?

Q June of 1974.

A Okay. I have a copy of what you are reading in my file. It says June of 1974.

Q And there was another incident in September of 197[illegible] a schedule change required his services, apparently the same type of incident as in June of 1974?

A Okay, the note says he was finally located after many tires, in Rochester.

Q And that was in June -- September?

A September of 1974, yes.

Q Okay. Do you have any records available showing what flight, if any, Mr. Slough missed in June of 1974?

A I don't have it.

Q Are they here?

A I wouldn't know.

Q Who would have them?

A I don't even know what sort of a record would exist, because, in making up our master schedule, we would assign a captain and a co-pilot to it. Now, we, of

course before assigning a co-pilot, especially if it was a change during the day, we would attempt to locate the co-pilot.

Now, if we could not locate him we would pass him by and bring or locate another co-pilot. Whom we located would then be put on our master schedule so it would not show that he was requested or that we attempted to find him. Our master schedule would show who actually flew the flight, not whom we attempted to find.

Q Is that master schedule here?

A For which date?

Q For June of 1974?

A No. You didn't ask for it and it is not here.

Q Do you have anything here that would show what flights were flown, charter flights were flown in June of 1974?

A You did not ask for those records and they are not here.

Q Do you know what flight Robert Slough missed in June of 1974?

A No, I don't.

Q Where was Mr. Slough stationed in June of 1974?

A June of 1974? Binghamton.

Q Any charter flights in June of 1974 originated in Binghamton?

A Any? Hundreds.
Q Did they originate any place else?
A Yes.
Q Where?
A A flight would originate if somebody asked us to pick them up in Pittsburgh, and it would originate there.
Q Where would the plane depart from to pick them up?
A In Binghamton, normally. It is conceivable they would depart from another point. If we had an airplane in Washington, and we wished to dispatch him to Pittsburgh, we would inform the pilot to go to Pittsburgh and pick up his passenger, and bring him to Binghamton.
Q Now, in September of 1974 Mr. Slough, allegedly he missed a schedule change and you say that you reached him in Rochester, on that occasion?
A That is what was reported to me.
Q Who reported that to you?
A Well, officially, Mr. Bell.
Q Do you recall that incident?
A Not that specific incident. I do recall conversations about Rochester and this particular pilot, about his inavailability, and being found in Rochester. I am sure that he was in Rochester more times than the record shows, and being unavailable during normal working hours.
Q Well, with reference to the September incident, you said

something about calls to Rochester. Are you sure that there were calls to Rochester in September?

A That is what was reported to me.

Q And about that time?

A If it was reported to me that it was that time, then that is when it happened.

Q Mr. Winston, was it reported to you about that time?

A I can't say. My wife is in charge of scheduling, and she frequently tells me about some of the incidents that occurred during the day, and I know about hearing about co-pilot Slough, and the Rochester operations.

Q Where was Slough stationed, in September?

A In September? I believe he was stationed in Elmira. That is September, 1974?

Q Yes.

A Right.

Q And any flights, or any charter flights or special flights that he would have been called on that conceivably could have originated from Elmira?

A Conceivably, yes.

Q Prior to September of 1974 were you flying any flights out of Elmira?

A Yes.

Q What flights?

A Our mail operation originated -- we had one mail

operation that originated out of Elmira.

Q Oh, and what hour did you fly the mails?

A I think it started around ten p.m. and terminated about four or five in the morning.

Q And that was one captain flying the mail?

A Yes.

Q And no co-pilots were required for that?

A Not normally.

Q And any other flights out of Elmira in September?

A Not on a normal basis. Maybe on an on-call basis.

Q Do you mean a charter basis?

A Yes.

Q And how frequently did you fly charter flights out of Elmira?

A Relatively infrequently.

Q What is your best estimate?

A I can't -- if you want to round it out, I know it was less than a million. I cannot tell you otherwise.

Q Your best estimate, Mr. Winston?

A I am sorry, I have no idea.

Q Is that the whole truth?

A I swore before I got on the stand that everything I would say would be the truth.

Q Less than a million? How about less than a hundred?

A I couldn't say.

Q More than two?

A More than two.

Q Over that period?

A That I could say yes, more than two.

Q Over what period, 1974?

A That I couldn't say.

Q This would be charter flights?

A Yes.

Q Those charter flights out of Elmira, where would they originate?

A They could originate from various places, depending on our group of scheduling girls, who would decide which airplanes would go where, and originate from where.

Q Would they originate in Elmira?

A Do they today, or did they at that time?

Q Today they originate in Elmira, I guess, is that right?

A Which period are you talking about?

Q During June of 1974?

A June of 1974? June of 1974? Are we talking about June of 1974?

Q Yes.

A Nothing in this note talks about Elmira in June of 1974.

Q You know nothing about Elmira in June of 1974?

A We did not run a schedule of operations in June of 1974. We started our operations in Elmira in September of 1974.

Q Then, you know nothing about Robert Slough being unavailable in June of 1974 with reference to Elmira?

A No, I don't know about that.

MR. CHALENSKI: Government offers into evidence, Exhibit forty-one and Defendant's Exhibit Z, is that in? I think that is Defendant's Exhibit Z? I have no objection on that.

MR. RICHARDS: I have no objection.

THE CLERK: Government's Exhibit forty-one, and Defendant's Exhibit Z, are received in evidence.

(Government's Exhibit forty-one, for identification, received in evidence.)

(Defendant's Exhibit Z, for identification, received in evidence.)

MR. CHALENSKI: May I read this to the Jury?

THE COURT: Yes.

MR. CHALENSKI: Government's Exhibit forty-one is a document taken out of the file of Robert Slough and it is written in ink, as you can see and Mr. Bell testified that he wrote it. This recites a schedule change that required his services, and there were three calls to his domicile and were ineffective in reaching him. Later that evening he called from Rochester. Subsequent discussion, and no satisfactory answers.

I think that is it. That was September of 1974.

June of 1974 reads, 'On a Friday, Mr. Slough was not scheduled on a specific flight. Fifteen hundred schedule change was required for his services. He was not available. It was later determined that he was in Rochester at that time by Miss Carr. Discussed with him and he said it won't happen again.'

Defense Exhibit Z is undated, and unsigned, and a letter that Mr. Winston testified that he had in his office in his file on Mr. Slough.

The memo reads, 'Memo to Jerry Winston. My comments about the employee Robert Slough are as follows: his performance has been unprofessional and unreliable. He has been late repeatedly at the ticket counter and has failed to show up for flights. He has engaged in loud responses to customers and left cash box visibily unattended on top of the counter and left his keys at home which meant he could not close up the operation. Called in from Rochester to New York, and that is seven-twenty-four --

MR. RICHARDS: This is more like an argument. I thought he was going to read this without any --

THE COURT: (Interrupting) Read it without any comments.

MR. CHALENSKI: Instead of being available for a flight in Elmira. Therefore, I feel that this employee's behavior reflects a different attitude toward the company and the general public as a result of his unprofessional conduct and I feel that Robert Slough should be terminated and replaced with someone willing to assume the necessary responsibilities. Mark Winston,' and there is no signature.

BY MR. CHALENSKI:

Q Did Mr. Speiser ever complain to you about Mr. Slough's radio procedures?

A Not to me.

Q Is there any note in the file of Mr. Slough, his file that was made contemporaneous with any of the events that you have testified to on direct as to the reason why he was fired?

A Any notes? I have the note that you showed to the Jury this note here (Indicating), and giving the dates --

Q (Interrupting) That was made in preparation for the trial, right?

A That was made at some time -- it was not in his file.

Q The only other thing is this memo to Jerry Winston, Defendant's Exhibit Z, which I have just read?

A In his file? That was not in his file.

Q There was nothing in his personnel file?

A No.
Q Was there anything that was made contemporaneously?
A I told you yesterday that we don't make notes as a normal practice.
Q Now, as regards to Mr. Josephson, you advised, on your direct testimony yesterday, that there were reports that he was disliked by captains?
A Just a moment. He was disliked by captains, that is right. That is what was reported to me.
Q When was it reported to you?
A During his period of employment.
Q You don't know when?
A No.
Q It could have been at the beginning of his employment?
A I don't know.
Q It could have been at the beginning of his employment?
A I don't know. Could it have? Possibly, I don't know.
Q Unfair to fellow co-pilots in not reciprocating, and do you know when that was reported to you?
A I don't know when it was reported to me.
Q Would that have been reported at the beginning of his employment?
A I don't know. It could have possibly, but I don't know.
Q On a flight to Boston, you testified that he flew with you and one engine went, in the summer of 1974, and is

there any notice in Mr. Josephson's file to that effect?

A No notes, to my knowledge.

Q That he changed the weekend duty roster, and is there any note in his file to that effect?

A I don't know.

Q Would you look, please?

A I don't have his file, but I have my file and the comments in it. Non-availability.

Q Any note made contemporaneously with his failure to -- or his changing of the weekend duty roster?

A I have no note in my records on that.

Q And the air Canada volume, and do you recall what period Mr. Josephson was responsible for keeping that up to date?

A I believe at the time of his termination, he was still responsible for it. But the total period, I do not know.

Q Was there any note in his file that he was reprimanded for failing to keep that up?

A Yes, there was a note. It was dated January 7th, 1974. Checking Canada Air pilot and found hadn't been posted for months.

Q Which file was that in?

A That was in his pilot's file. This is a copy of what was in the pilot's file.

Q May I see that?

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A Yes (Offering).
Q This is -- that is your notes?
A That is my notes.
Q This is the file which you produced pursuant to subpoena in this case, and was that in that file?
A I didn't produce that. Ted Bell produced it for the company.
Q This is the employer --
A (Interrupting) I don't know.
Q Was it in his personnel file?
A I don't know. I never looked at these files.
Q And the note that the -- the note which you have just shown me a copy of, was that in that file?
A It was indicated to me that this was taken from the pilot's file.
Q Would you please look through that file and see if the original of that note was in it?
A All right.

It is. It is here.

Q 'Dangerous flights'?
A Why don't you take this back (Offering).
Q All right. You said that there were complaints that he conducted a flight in a dangerous way, and when did you receive that complaint?
A At the time it happened.

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Q What time did it happen?
A April 18th, 1974.
Q There is a memorandum in his file to that effect?
A There is a copy, which was given to me, which I assume was in his file.
Q A copy of what?
A A copy of a letter from a passenger who complained about his dangerous operation -- co-pilot Josephson's dangerous operation.
Q And who was the pilot?
A The co-pilot or the captain?
Q Who was the captain?
A Briggs.
Q And was Briggs fired?
A No, he wasn't.
Q During that period --
A (Interrupting) Pardon me?
Q How about harassment of office personnel and is there a note in the file to that effect?
A I can't hear you.
Q Harassment of office personnel. When did that take place?
A Just a second. When did it take place?
Q Yes.
A Okay. I have a note here that says 'In September of

1974.' Now,when did it take place? To my knowledge, it took place --

Q (Interrupting) Was that note made contemporaneously with the incident?

A I don't know. It is just a summary of several complaints about Josephson.

Q And you don't know when that summary was made?

A I don't know.

Q Was it made in preparation for this trial?

A I don't know when it was made.

Q Was the summary made in preparation for this trial?

A I don't know.

Q During the course of your address to the co-pilots, which is page twenty-six, you said, 'I want you to read a thing I read to the Captains earlier. This paper was clipped out four years ago.'

A Well, that is -- I am sorry, I will have to wait for you.

Q Is that correct?

A It is wrong.

Q You said something different?

A The tape was not read properly at that point. That is not what I said.

Q What did you say?

A I said ,'I want to read something to you which I read to the pilots four years ago; a paper, a prepared speech.'

And that is what I read to the Jury yesterday.

Q Now, during the meeting of September -- strike that -- October 19th, 1974, you were -- you did discuss cutting routes, correct?

A In connection with the Golden West Contract.

Q You did discuss cutting routes, correct? Did you discuss closing the business?

A I can't answer that out of context.

Q Did you discuss closing the business?

A I -- no, I did not discuss closing the business.

Q You did not?

A No, I discussed Golden West Contract.

Q Do you deny that you discussed closing the business?

A I did not discuss closing the business. That was not the subject of the discussion.

Q Did you say anything about picking up your marbles and retiring?

A Yes, I said something about that. It was not the subject --

Q (Interrupting) Mr. Winston, just answer my question?

A Yes.

Q Now, is it your testimony, however, that you were careful to relate each one of those instances to your -- that it would not happen unless you had to sign a contract?

A I didn't say that it in my statement here to the Court. I didn't say I was careful. That was the subject, and it was all related to the Golden West Contract with the Teamsters. I wasn't careful by it, but I just said it.

Q So everytime that that was mentioned, it was understood by the pilots there --

A (Interrupting) No, it was not understood. Each time it was said that if I have to sign a contract like this Teamsters contract, then I would be affected in this way.

Q And you didn't fail to say that at any time that you mentioned picking up your marbles and cutting back --

A (Interrupting) Yes, I said that in yesterday's testimony I said that I had worked for thirty-four years --

Q (Interrutping) Just answer my question.

A I said I talked about -- that was mentioned in my discussion.

Q Page fourteen in the transcript, did you say this, 'We have a chance of buying three more Chieftons, I tell you, the way we have a chance to somebody negotiating with us about the three Navajos, which means we will replace them here. But, damn it, for the instability, the likelihood is that the Navajos will go but they won't get replaced, because the economic instability caused by this, we are in a tough

business.' Did you say that?

A No.

Q It is substantially correct?

A Substantially, but inaccurate in the number of aircraft. I believe that I said two Chieftons.

Q But everything else is correct?

A Yes.

Q Now, October 19th, you mentioned the retirement of Gerald Excell, and do you remember when you found out about that?

A I would say probably the beginning of October, or the end of September, or somewheres in that period.

Q Now, Mr. Briggs, when he testified, this is with reference to the conversation which you had individually with him about the ballots, that there is one that I know you -- you said, ' There is one way that I know you will not vote for the union, if you give me your ballot.' Do you deny having said that?

A I deny that.

Q Mr. Briggs was lying?

A Yes, he was.

Q And he asked you if you might get in trouble, and you said, 'Stick with me and there will be no trouble.'

A Well --

Q (Interrupting) Do you deny that conversation?

A I do.

Q Did you obtain a ballot from Mr. Briggs?

A Yes.

Q And Mr. Dolan, did you obtain a ballot from him?

A I believe so.

Q Mr. Gerald Excell, you obtained two ballots from him, ultimately, and one prior to the election, is that correct?

A That is correct.

Q Did you tell him that Mr. McKinley had given you his ballot?

A I said that they had volunteered their ballots.

Q And did you say that you would appreciate it if he would give you his ballot?

A Who?

Q This is Gerald Excell?

A No, I did not say that.

Q You deny that?

A Did Mr. Excell say that I said that?

Q I have an F.B.I. report that says 'Yes'.

A Is it signed?

Q It is a statement of the F.B.I. account.

A It is signed by Mr. Excell?

Q No, it is not.

And now, did you ask Mr. Floto for his

A No, I didn't.
Q He gave you his ballot?
A My recollection is that he did.
Q And Herrington gave you two ballots, correct?
A One before the election, and one after.
Q And Peter Johnson, did you tell him that a number of pilots had given you their ballots?
A No, I didn't tell him that.
Q You deny it?
A No.
Q Did you then initiate a period of silence, following that?
A What do you mean by a period of silence?
Q Just that.
A You mean I didn't talk for a year or so? I don't know what you mean.
Q Mr. Winston, a lot of pilots have given you their ballots, and following a period f a month or two months or three months, followed by no conversation?
A Then I will answer that by saying no.
Q Mr. Kleitz testified that after the meeting you came up to him and said, 'I have to know who is loyal.' Did you say that?
A I did not say that to him.
Q You deny that?

A I do.
Q And he was lying?
A He sure was.
Q Mr. Kleitz, did he ask you if it was illegal to take the ballots?
A He did not.
Q And you heard him testify to that, also?
A That he -- that I asked him for his ballot, I am sorry?
Q That he asked you if it was illegal to obtain the ballots?
A I heard him say that, yes.
Q And he was lying then, too?
A He was.
Q You obtained a ballot from Mr. Kleitz, correct?
A He offered me his ballot. I accepted it.
Q And did you obtain a ballot from Mr. Johnson?
A Yes.
Q Thomas Lewis, did you obtain a ballot from him?
A Yes.
Q And did you tell him, 'I would appreciate it if you would turn over your ballot'?
A I did not. Did he say that?
Q Yes, he did.
A When?
Q Lewis said that on January 22nd, 1975.
A Okay. It is incorrect. I deny it.

Q Mr. MacDougald, you obtained a ballot from him?
A Yes, I did.
Q And Mr. Pusztai, you obtained two ballots from him?
A One before the election, and one after.
Q And Mr. Solberg, did you tell Mr. Solberg, that, 'I want your ballot'?
A I did not.
Q Mr. Solberg said that after the election he had no conversation with you concerning his vote in the election, and was he lying?
A He did.
Q And you got both ballots from Mr. Solberg?
A That is correct. One before the election and one after.
Q So you obtained two ballots from him, is that correct?
A Yes, one before and one after.
Q Do you recall Mr. Ton testifying that with regard to the second ballot, it was right before the election?
A I recall his testifying to that.
Q And did he lie?
A I think he was mistaken.
Q Did you tell Mr. Ton, 'Show me support by giving me your ballot'?
A I did not.
Q Do you deny that?

A I do.

Q And did you ask Mr. Ton, in November of 1974 whether he was going to vote for the union or remain non-union?

A Did I ask him that?

Q Yes?

A I didn't.

Q You did you did not?

A I did not.

Q Did you tell him that if you think my way you are going to benefit?

A No, I didn't.

Q And you heard Mr. Ton testify to that, did you not?

A Yes, I did.

Q And he was lying?

A I would have to say he was.

Q Mr. Williams: did Mr. Williams, did you hear Mr. Williams testify that, 'Show your loyalty to me'?

A I never said that to him.

Q Are you familiar with that --

A (Interrupting) Pardon?

Q Did you tell or say to him -- strike that.

You got a ballot from Mr. Williams, is that correct?

A I believe I did.

Q And you also got ballots from Mr. Ferber and McKinley,

and Ore, is that correct?

A That is incorrect.

Q And who did you get a ballot from?

A Mr. -- Mr. Ore did not give me a ballot.

Q Mr. Ore left your employ some time during October of 1974, is that correct?

A That is correct.

Q Before the election?

A Yes.

Q Out of twenty-one pilots, who were ultimately certified then, thirteen gave you their ballots?

A That is incorrect.

Q That is incorrect?

A That is incorrect.

Q Was it more or less?

A Well, your statement is incorrect.

Q That of the twenty-one pilots --

A (Interrupting) There were twenty-six pilots who received ballots.

Q There were twenty-six, and twenty-one were certified to vote?

A That is right. But twenty-six got ballots. Some of the people that were disqualified had given me their ballots.

Q I understand. Of the twenty-one who were certified,

did that include Dolan, Excell, Floto, Herrington, Johnson, Kleitz, Mr. Lewis, Mr. MacDougald, Mr. Pusztai, Solberg, Ton, and Williams?

A My recollection is that they gave me their ballots.

Q Did a Mr. Fairchild tell you that he voted no?

A Did he tell me that?

Q Yes.

A Mr. Fairchild told me that he was for the company, and as I recollect, he gave me his ballot.

Q Okay. That would make fourteen?

A I would have to count them if you are going to give me a set of numbers, and I would have to check my records to see if my recollection is the same as yours. My recollection is that there were about thirteen -- possibly fourteen, and I would have to look at it.

Q Mr. Fairchild?

A I recollect him giving me the ballot.

Q What about Reeve? You deny asking him for his ballot, is that right?

A I deny it, and he stated that I didn't ask for it.

Q I haven't said anything other than that.

A I am sorry, sir.

Q So fourteen, and I think I named thirteen, and you said Mr. Fairchild you believe gave you his ballot?

A To my recollection, I believe that is right.

Q And did Mr. Sholl give you his ballot?

A I believe he did not.

Q Mr. Lamos?

A He did not.

Q Did Mr. Larimore give you a ballot?

A He did not.

Q Did Mr. Hummell give you a ballot?

A He did not.

Q That accounts for now all but two, and did Mr. DeLaurentis, did he give you a ballot?

A I don't -- no, I guess he did not.

Q And Mr. Leonard?

A I can't remember whether he offered it or not.

Q When you asked for -- strike that.

When you had a conversation with Mr. Sholl, an individual conversation prior to the election, is that right?

A Yes.

Q And Mr. Sholl told you that he already mailed a ballot in?

A He did.

Q And Mr. Lamos, during a similar conversation, did he tell you that he thought his vote was a private matter and no one's business but his own?

A I didn't ask him and he didn't tell me.

Q You deny that he told you that?
A Yes.
Q And did Mr. Larimore tell you that he had already mailed his ballot in, and that he thought he voted what was best for the company and his family and himself?
A Mr. Larimore said that he had mailed his ballot --
Q (Interrupting) Do you deny that he told you that, or did he tell you that?
A I have no recollection of his telling me that.
Q Did you hear him on the stand say that he told you that?
A My recollection of what he said on the stand was that he indicated that he had mailed his ballot before we started the meeting, and I told him that I was not interested -- 'Don't tell me how you voted, I am not interested,' and that is -- that is correct, I agree with that.
Q You don't recall hearing him say on the stand that he told you that he did what was best for the company, his family and himself?
A He may have said that. I don't know or recollect it.
Q And did he tell you that during the conversation with him prior to the election?
A Not to my recollection.
Q He may have?
A No, I don't think he did.

Q You deny that?
A Since I have no recollection of it, I deny it.
Q And what did it mean to you if an employee gave you his ballot?
A It meant to me that he was voting against the union.
Q By that you would know that he was voting against the union?
A No. I don't think so. Because when they got duplicate ballots I indicated that I wanted no part of duplicate ballots, and I refused to accept any.
Q But you testified on direct that you didn't know that they were getting duplicate ballots until you had, and I don't know your words, until it was substantially completed, after the initial ballots?
A But I knew it was possible for them to request other ballots.
Q Mr. Williams, at least, told you so?
A Mr. Williams?
Q He testified on the stand that he did, didn't he?
A No, I don't think that he testified to that.
Q Mr. Williams did?
A That he told me what? I didn't testify to that.
Q Did you hear Mr. Williams testify on the stand that he told you during your private meeting with him that you know we can get duplicate ballots?

A I heard him testify that.
Q And did he say that?
A No, I deny that he said that.
Q Did you recall telling your pilots at the meeting of October 5th, during the course of your prepared statement, on page twenty-eight, 'Will my ballot be absolutely secret; will any one know how I voted? The answer. The United States Government will have full supervision while the balloting is going on, and will protect you from interference. Your ballot will be absolutely secret.' Did you tell your pilots that?
A Yes, I did.
Q Did you hear Mr. Kleitz testify on the stand that following the incident where the door fell, he came to you and began to tell you what happened and you told him, 'I know all about it, ' and did you hear him testify to that?
A I heard him testify to that.
Q And did you respond to that?
A Mr. Kleitz' testimony was, I will say, mildly incorrect.
Q Mr. Williams, you mentioned that in your direct testimony, that one of his problems was being late, is that correct?
A I remember saying that, yes. That was part of my testimony.

Q And there was a note in your file regarding a scene late in January, 1974, that was brought out by Mr. Bell, and did you hear Mr. Bell testify to that?
A Mr. Bell testified to a lot of people and a lot of things, and I can't recall what that specific item was that was covered, or how he covered it, I should say.

THE COURT: We will take a short recess and cool off.

(Whereupon, the Jury was excused.)

THE CLERK: Court stands for a short recess.

(After a short recess, the proceedings were resumed as follows: before the Court and the Jury.)

BY MR. CHALENSKI:
Q Mr. Winston, with reference to Mr. Williams, you mentioned that there was some money missing at about the time that he was fired, is that correct?
A Yes, I did.
Q And I believe that you also mentioned some money was missing with regard to Mr. Sholl, and -- Mr. Slough -- excuse me, it was Mr. Hummell, and I am not sure about Mr. Larimore?
A Well, I have Mr. Williams' file in front of me, and my notes say 'Yes'. I would go back to my files if

you want me to.

Q Did you mention money missing with Mr. Larimore?

A The answer is yes. But I will pull my file on that.

Q Did you mention money missing with Mr. Hummell?

A Just a minute.

Yes.

Q And did you mention money missing with Mr. Slough?

A Yes.

Q Now, the last of those four persons were fired on about February 14th, 1974, is that correct?

A The last of which four people?

Q The last of the four that I just named: Mr. Slough, Mr. Williams, Mr. Hummell and Mr. Larimore?

A February 23rd -- February 17th, I guess it was.

Q And did you report to the state police during about May or June of 1975 that money was missing from your operation?

A I would say it was April or May.

Q After they were fired?

A Yes.

Q Are there any pilots other than Mr. Slough who were unavailable for duty twice?

A Mr. Slough? If I can remember, Mr. Josephson.

Q Any others?

A Do you want me to go through each file?

Q Do you know, off the top of your head?

A No, I am in a courtroom and I want to be accurate.
Q Do you deny --
A (Interrupting) I don't deny. If you want me to take the time, I will look it up.
Q I don't want you to take the time, Mr. Winston.
A Okay.
Q Did any pilots leave the cash box on the counter, unattended?
A I remember Mr. Slough, for one.
Q And did you personally observe Mr. Slough do it?
A No, I did not.
Q Who did?
A Well, for one, my son, Mark Winston reported it.
Q And Mark Winston, in his letter, Defendant's Exhibit Z of August 1974?
A Also in person.
Q And nobody else saw the cash box on the counter?
A I am sure that there are other incidents.
Q The office -- you said Mr. Slough, it was reported to you that Mr. Slough did not lock up the office and did not bring his keys with him?
A That is true.
Q And nobody else did not lock the office up?
A I am sure there were other times.
Q Mr. Hummell, not having his uniform? Was Mr. Hummell

flying the Metro at the time he was discharged?

A I believe he was.

Q And there was an incident where Mr. Pusztai had an engine problem during the 1976, and he testified to that on the stand?

A Yes.

Q And do you know what it was?

A An incident on a propeller.

Q And do you recall the approximate value of the damage done at that time?

A Well, I would say $2,000.00 or $2,500.00.

Q Not $53,000.00?

A Fifty-three thousand dollars? No, it wasn't $53,000.00.

Q Mr. Pusztai is still with you?

A Yes, he is.

Q And Mr. Herrington landed without his landing gear being down on one occasion?

A That is not true.

Q He testified that he did?

A He didn't. He didn't forget his landing gear down.

Q I didn't say that.

A I am sorry, I misunderstood you.

Q I said Mr. Herrington landed without his landing gear being down on one occasion?

A His landing gear was down. It collapsed.

Q And then Mr. Herrington misspoke on the stand?
A That is my recollection of it.
Q Mr. Herrington said it was not intentional, is that correct?
A That's right. That would be correct.
Q And Mr. Herrington went below a flight approach minimum on one occasion?
A He indicated that he did not.
Q Did you or your company suspend him from passenger operations for thirty days because of that, is that correct?
A We did.
Q Mr. Herrington is still with you?
A Yes, he is.
Q Any other incidents in the last four years that did damage to your planes?
A Sure.
Q And what were those incidents?
A Well, I can remember one glaring incident because of the newness of the aircraft, and it was our Metros one and two, and they had just arrived not too long before, and Captain Briggs negligently left his brakes off, and one airplane rolled into the other.
Q That would have been about 1973, about?
A 1973 or possibly early 1974.

Q Substantual damage caused to each?

A I would say so, yes.

Q And Mr. Briggs was not fired?

A No, he wasn't.

Q And any other incident of damage?

A Well, I am sure there are, but unless you can point one to me, I don't think I can pick one out at this time.

Q Mr. Sholl was the only person fired since 1970 -- 1971 for damage to an airplane?

A I didn't say that.

Q Was that true?

A No, that is not true.

Q Who else was fired?

A I remember a mail pilot that damaged an airplane, and he was discharged.

Q And when was that?

A 1970 or 1971, somewheres in that area. I don't know. It could have been 1972 and I don't know.

Q Was he a part time pilot?

A No,he was a full time pilot.

Q And you don't know his name?

A I am sure I can find it in the record, or if you would give me a moment, I can confer and find the persons' name.

Q Okay. Please take a moment.

(Whereupon, the witness left the witness stand and conferred with Defendant Ted Bell.)

A Mr. Norman Bancock.

Q How do you spell that?

A B-A-N-C-O-C-K.

Q And do you recall what year that was?

A I can check my records.

Q Please do?

A Yes, this was in 1970.

Q And what damage was done to the plane on that occasion?

A I think a propeller was damaged.

Q Anything since then, besides Mr. Sholl?

A You name one.

Q You can't recall?

A I am sure that there are incidents, but I can't name one at this time.

Q Incidents that a pilot was fired because of damage caused to an airplane?

A Possibly.

Q You don't recall any, is that correct?

A That is what I said.

Q How about Mr. Potterman, and he was hired as a co-pilot, is that correct?

A Yes, he was.

MR. CHALENSKI: I have no further

questions.

RE-DIRECT EXAMINATION

BY MR. RICHARDS:

Q Perhaps I misunderstood the question put to you, by Mr. Chalenski, but Slough was discharged, when?

A Slough? He was discharged, I think, October 3rd, 1974.

Q Okay. Now, you earlier testified to a decision to cut back on your staff by September 20th, 1974. What occurred on that date which dictated that position?

A On September 20th, that is our deadline on the official airline guide. Now, the officer Airline Guide is a book used by anybody in the travel business. It tells which airplanes leave from which airports, and what service, and between which airport and the time it leaves and the flight number and the fares. It is the official book of the travel industry. It is about the size of a Manhattan telephone book. We have deadlines to get into them, and usually they give us six weeks as a deadline, if you want to get in. September 20th is the deadline for appearing in the official airline guide on October 1st.

Now, at that time I was confronted with what we were going to do. As far as I was concerned not only was it the deadline for the official Airline Guide, but it was the decision date as to what we were

going to do with our new aircraft, the Metros three and four.

And I had made the decision, at that time, that these airplanes would not be used, they would be grounded, and, therefore, I did not increase any schedules to reflect why these airplanes were brought on, the Metros three and four.

And so when I pointed out, on September 20th, that in fact we were dropping two Dulles flights, and having no increases, that is we decided not to go to Cleveland and some of the other points that we had programmed or planned for with the new airplanes, and we were terminating any possible use of these airplanes until March 1st.

The next time we had a chance to make a schedule change in the official Airline Guide would have been October 20th, a month later, and the official Airline Guide change made on October 20th is effective December 1st, and December 1st is the beginning of our off season, and that is when our traffic is the lowest. That is no time to start a new schedule, so the only time that you can start a new schedule would be for March 1st.

So when we said on September 20th that we are going to cut schedules, and we are not going to

increase schedules, that was it, until March 1st.

Q Now, Captain Kleitz, following the Sholl incident, did you talk with him following the incident about the door?

A Yes, I did.

Q And how long had Kleitz been a Captain with the airline?

A Mr. Kleitz had been a Captain since January of 1974.

Q Did you hear him testify that he was a Captain since 1970?

A That is correct, he did.

Q And what did Kleitz tell you about the Sholl incident with the door?

A He said that -- he said that he was a captain of the aircraft, that he was not aware that the door had dropped and asked me to reinstate co-pilot Sholl.

Q Did he say anything about hearing the door drop?

A He said he didn't hear a thing.

Q And you heard him testify here that he heard a bang?

A Yes, I did.

Q And now, at the meeting on October 5th, 1974, when you spoke with the co-pilots, and the pilots and the captains, did you say to these two groups, on page two, ' We have no intention whatsoever of abandoning the policies where instituted on rights and benefits and what was done was done because we thought it was fair and just.

We do not to intend to become unfair and unjust or improper because of the union.'

MR. CHALENSKI: Your Honor, that is leading, and I object.

THE COURT: Sustained.

MR. RICHARDS: That was opened up --

THE COURT: (Interrupting) That doesn't improve the question. It is leading.

BY MR. RICHARDS:

Q Was there a captain by the name of F. J. Grell, Senior employed by Commuter Airlines?

A Who?

Q Well, maybe it is a Green?

A Yes, there was.

Q And do you have any records, or can you recall the date that he was hired?

A I have the record on that. Mr. Green, who was hired, according to our records on December 22nd, 1974.

Q And your record also shows as to why he was hired at that time?

A Yes, it does.

Q And what was that reason?

A He was rehired to replace Captain Lamos who was discharged on December 13th, 1974.

MR. CHALENSKI: May the record indicate

what the witness is referring to?

THE COURT: Yes, could you mark it in some way?

THE CLERK: Defendant's Exhibit A-k, marked for identification.

(Document marked Defendant's Exhibit A-k for identification.)

BY MR. RICHARDS:

Q Now, Mr. Winston, I show you Defendant's Exhibit A-k marked for identification, and just ask you if that is the record to which you referred to?

A Yes, it is.

MR. CHALENSKI: I have had an opportunity to review that, and it appears to be handwritten notes as prepared for the trial in this case. It may be a summary of what the record shows and if so, he should so testify that that is what it is.

THE COURT: Could I have the pending question, and what is your objection and not your argument. What is your objection?

MR. CHALENSKI: My objection is that the witness is not referring to corporate records in front of him.

THE COURT: So what?

MR. CHALENSKI: Well, the question is,

'What do your records show?'

THE COURT: Okay.

BY MR. RICHARDS:

Q Would you answer the question?

A I am sorry, would you repeat the question.

Q Well, let's take this one and I ask you in reference to a captain by the name of Henry Miller, was he employed by Commuter Airlines?

A He was employed by Commuter Airlines.

Q And do you recall the date of his employment?

A The record shows that he was employed on February 23rd, 1975.

Q And do you, from your own knowledge, know as to the reasons why he was employed on or about that time?

A Yes.

Q And what was the reason?

A He was employed to replace Captain Floto.

Q And do you recall when Floto terminated his employment with the company?

A April 20th, 1975.

Q Now, Douglas Ton was a witness at this trial?

A Yes, he was.

Q And when was he employed?

A Ton? He was employed 7/21; July 1, 1974.

Q He was employed on or about the same time as Slough and

Hummell an chat other group?

A Yes.

Q And this was during a period when you anticpated an expansion with the company?

A Yes, it was.

Q And how about Peter Johnson? Was he a co-pilot with the company?

A Yes, he is.

Q And he is still with the company?

A Yes.

Q And when was he employed?

A About the same time; the same time period.

Q And do you recall the reasons for his employment at that time?

A Yes, he was part of the build-up personnel in anticipation of the arrival of the two new Metros which were delivered in July and August of 1974.

Q Which were subsequently grounded by you?

A Yes.

Q This is part of building up the staffing d increasing it for these Metros?

A Yes.

Q And did you have an employee by the name of Ivar Ore?

A Yes.

Q And again, do you recall the date of his employment?

A It was a little later in the year, but essentially I think he was hired about the same time; the same time frame.

Q And how about William Potterman, and do you recall when he was hired by the company?

A Potterman was a Captain.

Q I understand, but when was he hired?

A He was hired on February 9th, 1975.

Q And do you recall the reasons why he was hired at that time?

A I do.

Q And what were those reasons?

A He was hired to replace Captain Hank Excell who retired on January 27th, 1975.

Q And how about John Moreity, and was he employed by Commuter?

A Yes.

Q And was he either a Captain or a co-pilot?

A A co-pilot.

Q And when was he employed?

A He was hired on March 23rd, 1975.

Q And do you recall the reasons why he was employed by the company at that time?

A Yes, he was hired to replace a resigned co-pilot, DeLaurentis, who resigned March 2nd, 1975.

Q How about Frank McKeon , and was he a Captain or a co-pilot?

A He was a co-pilot.

Q And do you recall when he was hired?

A Yes, April 13th, 1975.

Q And do you recall the reasons why he was hired?

A He was hired to replace a resigned co-pilot, Lewis, who resigned March 1st, 1975.

Q All right. How about Joseph Motto, Junior, and was he a pilot?

A No, he was a co-pilot.

Q And do you recall when he was employed?

A May 4th, 1975.

Q And do you recall the reasons why he was employed by the company?

A Yes, he was employed to replace a resigned co-pilot, Fairchild, who resigned April 14th, 1975.

Q Now, did you have a part time pilot at that time by the name of Allen Gerrin?

A Yes.

Q And did he --

A (Interrupting) A little later, I should say.

Q A little later?

A Yes.

Q And was he strictly a part time, summer type of --

A (Interrupting) He was a college student, and he was stricly there for the summer time.

Q How about Paul Darby, and was there a pilot by that name?

A Yes.

Q And when was he employed by the company?

A He was employed May 4th, 1975.

Q And do you recall the reasons why he was employed at or about that time?

A Yes, he was employed because we had just brought on three new co-pilots, and we figured there would be attrition.

THE COURT: We have reached our luncheon time, and we will recess now for half an hour.

(Whereupon, the Jury was excused.)

THE CLERK: Court stands in recess for one half hour.

AFTERNOON SESSION

(Whereupon, the following proceedings took place before the Court and the Jury.)

THE COURT: Good Afternoon. I am sorry for the delay, but we had another matter that we had to use the courtroom for.

Proceed.

BY MR. RICHARDS:

Q Mr. Winston, on cross examination there was a question about an accident with a fellow by the name of Briggs, as Captain of the aircraft, and are you familiar with that accident?

A Yes, I am familiar with the accident surrounding Briggs.

Q And what were the circumstances surrounding that accident?

A There were two accidents, one accident in which he parked on our airport ramp, behind another Metro, which was parked in front of him, and -- well, the airplane rolled into the aircraft in front of it, and caused considerable damage, such as rupturing the wing, and rupturing the de-icing equipment, and rupturing the fuel tank and our investigation showed that Captain Briggs neglected to apply the parking brakes.

Q And did you speak to him about the incident?

A Yes, we had an investigation and discussion with

Captain Briggs, and he indicated that it was unintentional. It was just one of those things. It was negligence, but unintentional.

Q And did Briggs have any more accidents?

A Yes, he did. He had another incident in which he neglected to apply a safety protector to a stall-avoidance system. We call it a S.A.S., and it is a stall avoidance system, and the damage was about $3,000.00.

Then, I called him into the office and talked to him about that. He said it was negligence, but I don't care, so I discharged him.

Q Now, there was also testimony on, or a question being asked about another pilot?

A Yes.

Q And are you aware of the circumstances surrounding that incident?

A It was Bancock. Mr. Bancock was flying a mail plane and landed at Elmira, and made a very elementary mistake, which we caution new students about. He over shot the runway, and in over shooting the runway, he ran off the end of the runway, hit a light as he went over the runway and damaged that light. We discharged him because we felt that he was not qualified as a captain in our operation.

Q All right. Now, there was some discussion of an accident by Herrington, with an aircraft, and are you familiar with that?

A Yes, I am. This accident occurred in Scranton, in which the landing gear collapsed on landing. Investigation showed that it was not the fault or caused by Captain Herrington. No action was taken as a result, as far as Herrington was concerned.

Q And it was a maintenance problem with the aircraft?

A Yes, it was a maintenance problem.

Q And was that the only accident, to the best of your recollection, that Mr. Herrington has ever had?

A Yes.

Q And how about Pusztai?

A Yes. Well, Pusztai was taxiing out in Binghamton in a blinding snowstorm, and he had instructed his co-pilot to look out the right side, and he would watch or look out for lights, which were the obstructions on the left side. The airplane had a slight deficiency with the windshield tending to fog, which we have since modified so it won't happen again. But at the time it was our first occurrence in which the fogging created a whiteout so that you could not see anything, and the co-pilot was taking an instrument clearance, that is clearance from a control tower which told him

what his route of flight would be, the altitude that he would fly so that he momentarily did not look outside. Of course, the cpatain is responsible for his airplane, and he is directly responsible for the safety of his airplane, but in reviewing the circumstances there, we felt that Mr. Pusztai should not be penalized for it, so we took no action.

Q Why wasn't he penalized or disciplined for that accident?

A It was accidental. It was not an intentional act. I wouldn't even call it a negligent act.

Q And why wasn't Herrington penalized for his act?

A He had no control over the accident. It was a maintenance problem.

MR. RICHARDS: I have no further questions.

THE COURT: Anything further?

MR. CHALENSKI: No, Your Honor.

THE COURT: You are excused.

(Whereupon, the witness was excused.)

MR. RICHARDS: I call Ted Bell to the stand. He has been sworn before and testified.

THE COURT: You are still under oath, Mr. Bell.

T H E O D O R E (T E D) B E L L

Called as a witness, being previously duly sworn, was further examined and testified as follows:

DIRECT EXAMINATION (Continuing)

BY MR. RICHARDS:

Q Mr. Bell, I would like to show you Defendant's Exhibit A-g, marked for identification, and ask you if you are familiar with that document (Offering)?

A Yes, I am.

Q And what is that document?

A That is basically a list of the turn over of pilot employees since 1970.

Q Now, have you had an opportunity to examine the payroll records and determine if each of the pilots showed on that document were employed by Commuter Airlines?

A Yes, they were.

Q And this document also consists of two columns, is that correct?

A Yes, sir.

Q And what is the first column?

A Resigned.

Q And what is the second column?

A Terminated.

Q And terminated means what; discharged?

A Discharged for reasons other than --

Q (Interrupting) Do you have personal knowledge of the circumstances surrounding each of those pilots and the reasons why they left the company?

A Yes, I do.

MR. RICHARDS: Your Honor, I would like to move Defendant's Exhibit A.

MR. CHALENSKI: May I see them?

MR. RICHARDS: Yes (Offering).

MR. CHALENSKI: May I question on this, Your Honor?

VOIR DIRE EXAMINATION

BY MR. CHALENSKI:

Q Mr. Bell, Defendant's Exhibit A-g, reports to show resignations and terminations?

A That is correct, sir.

Q And terminations is anything other than resignations?

A Yes, sir.

Q And is that obtained from the personnel and employment records of the company, from your own knowledge, or both?

A From my own knowledge, primarily.

Q From what?

A From my own knowledge.

MR. CHALENSKI: Your Honor, accept insofar as Defendant's Exhibit A-g shows incidents which happened in 1976 and incidents which may have happened after July 2, 1975, I have no objection. However, I do move that any such incidents be stricken

from this document as irrelevant in this case.

MR. RICHARDS: No objection.

THE COURT: All right, we will receive it subject to striking the material not in the case.

MR. RICHARDS: I have no further questions.

THE COURT: Any cross-examination?

CROSS EXAMINATION

BY MR. CHALENSKI:

Q Mr. Bell, on September 30th, 1974, you flew a plane to Elmira to pick up some passengers, correct?

A That is correct.

Q And there was one overbooking?

A There was one over booking.

Q Well, excuse me, there was one passenger too many for the plane?

A One passenger too many for the seats available.

Q Do you recall the departure time of the flight?

A No, I don't.

Q Do you recall what time of day it was?

A That was in the afternoon.

Q Late afternoon?

A Sometime in the afternoon; mid afternoon or late afternoon.

Q It was not early afternoon?

A I don't believe so.
Q Do you recall speaking with the Defendant Winston on that day concerning discharge of certain employees?
A I believe we discussed it, yes, sir.
Q Well, isn't that the day that Mr. Winston testified that he reviewed all of the co-pilots and determined which of them should be terminated?
A I don't recall the exact day but we did discuss it, yes, sir.
Q And do you recall whether or not it was that day?
A It may have been.
Q And do you recall what time you discussed that with him?
A I don't.
Q Was it late evening?
A It could have been.
Q It could have been early morning?
A I don't believe it was, but I don't know.
Q Could it have been early afternoon?
A I can't -- I cannot recall, sir.
Q You cannot recall any time?
A I cannot recall the time.
Q Do you recall how long that discussion took?
A No, I don't.
Q What is your best recollection?

A It is hard to say, sir.
Q Half an hour?
A It could have been.
Q An hour?
A I don't know. I really don't recall the length of the discussion.
Q Not at all?
A Not at all.
Q Was it a substantial discussion?
A I would think that we discussed it quite a bit, yes, sir.
Q And you reviewed each co-pilot?
A Quite a few of them, yes, sir.
Q And determined which ones should be terminated?
A We discussed the possibilities concerning all of them, yes, sir.
Q And you don't recall how long the discussion took?
A No, I don't.
Q And you do not recall when it took place?
A Not precisely, no.

MR. CHALENSKI: Thank you, Mr. Bell. I have no further questions.

MR. SHANAHAN: I have none.

MR. RICHARDS: The Defendant would like to call Jerry Winston to the stand.

(Whereupon, the witness was excused.)

JERRY WINSTON

Called as a witness, having been previously duly sworn, was further examined and testified as follows:

RE-DIRECT EXAMINATION

BY MR. RICHARDS:

Q Now, Mr. Winston, I show you Defendant's Exhibit A-h, presently in evidence, and ask you if you would relate to the Jury waht that particular graph shows?

A It shows the ratio of turnover of pilot-employees of Commuter Airlines, starting with 1970, and going through tne period in question in this trial.

Q All right. Now, in the year 1970, how many employees did you have?

A We had a total of twenty-eight pilot employees.

Q Pilot employees, and we are not talking about maintenance or office personnel?

A No, just pilots.

Q And in that year, how many pilots left?

A Eight pilots left. That resulted in the twenty-nine percent ratio of the people that left, to the people that we had during the year.

Q Now, this eight left, and that does not indicate wnether they were discharged or terminated or what?

A Just separate.

Q Now, what about 1971?

A In 1971, we had twenty-six pilot-employees of which ten left during the year, giving us a percentage of thirty-eight percent of our pilot employees who left during that year, 1971.

Q And 1972?

A In 1972 we had a total of twenty-nine pilot employees of which nine left, which gives us a percentage of thirty-one percent.

Q And in 1973?

A In 1973, we had twenty-seven pilot employees, and eleven left during the year, 1973, which gave us a ratio of forty-one percent of the pilots who left over the pilots who were there during that year.

Q And in 1974?

A In 1974 we had a total of thirty-three pilot employees, of which twelve left, so it gave us, in that year, it had dropped to thirty-six percent as a ratio of pilots who left over the pilots who were there in 1974.

Q And the ratio for 1974 was actually lower than it was in 1973?

A Yes, 1974 is lower than 1973 and 1971.

Q Okay. Now I show you Defendant's Exhibit A-1, now in evidence, and ask you what that graph demonstrates?

A This graph demonstrates a ratio of discharges to the total pilot employee turnover. In other words, during

the year, we had a total of eight pilots who left. In 1970, we had a total of eight pilots who left, and three of the eight pilots were discharged.

Q And when you say discharged, what do you mean?

A Fired.

Q Okay.

A And therefore, the ratio of discharged -- the total of that was thirty-eight percent. And in 1971 we had a total of ten pilots who left that year, and five of them were discharged, or fired, which means that fifty percent of the pilots were fired in 1971.

In 1972 we had a total of nine pilots who left, five of which were discharged or fired, and therefore, the ratio of firings was fifty-six percent of the total pilots who left that year.

In 1973, it dropped to thirty-six percent which represents a total of eleven pilots who left. Six of the eleven pilots who left, four were fired, so therefore we end up with thirty-six percent.

In 1974, we had a total of twelve pilots who left, five of which were discharged, giving us a ratio of forty-two percent for 1974.

So you can see, therefore, that forty-two percent of 1974 was far lower than the fifty-six percent in 1972, and than the fifty percent in 1971.

MR. CHALENSKI: I object to that characterization.

THE COURT: Yes, strike it out.

BY MR. RICHARDS:

Q Now, I show you, Mr. Winston, Defendant's Exhibit A-j, (Offering)?

A This demonstrates, over the same period, 1970 through 1974, the ratio of discahrges to the total pilot employees.

Q And what, in total pilot employees employed by the company in that year?

A Yes, employed by the company in that year. So that in the year 1970 we had twenty-eight pilot employees. Out of those three were discharged or fired, and so that therefore the total ratio was eleven percent. That is, of the pilots that is of the pilots that were discharged over the total of the pilots employed.

In 1971, we had twenty-six pilot employees, and five of them were discharged. So that the ratio in 1971 was nineteen percent.

In 1972, we had a total of twenty-nine pilots, five of whom were discharged, giving us a ratio of seventeen percent.

In 1973, we had twenty-seven employees pilot employees, and four were discharged. So, therefore,

we had a ratio of fifteen percent.

In 1974, we had a total of thirty-three pilot employees, and five were discharged, so the ratio was again, fifteen percent.

MR. RICHARDS: Thank you.

MR. SHANAHAN: I have no questions.

RE-CROSS EXAMINATION

BY MR. CHALENSKI:

Q Did any of those employees that were terminated, and that was for anything other than quit, did they work for any less than a full payroll period?

A I don't understand you.

Q There is a number of employees from 1970 through 1975 who left the mploy of the company. Did any of them work for less than a full payroll period?

A You have to define a payroll period.

Q Well, what was your payroll period?

A A week.

Q And did any of them work less than a week?

A To my knowledge, no.

Q No employee in that period of time worked for less than a week?

A To my knowledge, no.

MR. CHALENSKI: I have no further questions.

MR. RICHARDS: No questions. The Defendant rests.

THE COURT: The Defendant rests.

MR. SHANAHAN: Defendant Bell rests.

THE COURT: The Jury may take a short recess.

(Whereupon, the Jury was excused.)

(Whereupon, the following took place before the Court, out of the presence of the Jury.)

THE COURT: Do you have any rebuttal?

MR. CHALENSKI: There will be some.

MR. SHANAHAN: Perhaps I can reserve on that for a minute.

MR. CHALENSKI: May I have one second, Your Honor?

THE COURT: Sure.

(After a short recess, the proceedings were resumed.)

THE COURT: Bring in the Jury.

(Whereupon, the following took place before the Court and the Jury.)

MR. CHALENSKI: I recall Robert Slough. The Government calls Mr. Robert Slough to the stand.

R O B E R T L. S L O U G H

Called as a witness, being previously duly sworn,

was further examined and testified as follows:

REBUTTAL EXAMINATION

DIRECT EXAMINATION

BY MR. CHALENSKI:

Q Mr. Slough, do you recall an incident on September 30th, 1974, when there were ten passengers for a nine-passenger flight?

A Yes, I do.

Q Do you recall what time the flight took off from Elmira?

A The scheduled time was around 4:15 in the afternoon.

Q The schedule was 4:15?

A Yes.

Q And do you know what time it took off?

A Approximately ten minutes after five.

Q Mr. Slough, during the time that you were with Commuter, did you ever see the cash box visibly unattended on top of the counter?

A Yes, sir.

Q When?

A In Elmira.

Q And ever in Binghamton?

A No.

Q And did you leave it unattended on top of the counter?

A No.

Q Were you ever accused of leaving it on top of the

counter?

A Nothing was ever said to me, no.

Q And did you ever leave -- excuse me, did you ever have occasion to close the Binghamton operation?

A Yes, I did, yes.

Q And what flights were you flying when you were in Binghamton?

A The flight that I closed the --

Q (Interrupting) What flight did you fly from Binghamton?

A I usually flew the morning flight to Newark, New Jersey.

Q And was there occasion that you had to close the Binghamton office?

A Yes, there was.

Q And did you have the keys with you?

A Yes, I did.

Q And did you have occasion to close the Elmira office?

A Yes.

Q And how many occasions?

A Quite frequently at Elmira.

Q And did you ever fail to have the keys with you?

A No, sir.

Q Were you ever late in locking the ticket counter?

A Not that I recall, no, sir.

Q And were you ever spoken to about it?

A No, sir.

Q And were you ever spoken to about engaging in loud and irresponsible comments to customers?

A That was mentioned as one of the reasons I was fired.

MR. SHANAHAN: May I have that read back?

(Whereupon, the previous answer was read by the Reporter.)

BY MR. CHALENSKI:

Q Mr. Winston or Mr. Bell?

A Mr. Bell.

Q And did he tell you what incident he was referring to?

A No, just that a customer had complained about my handling the ticket counter.

MR. CHALENSKI: Thank you, Mr. Slough.

CROSS EXAMINATION

BY MR. RICHARDS:

Q Did you ask Mr. Bell the name of the customer?

A No, I didn't.

Q Did you ask him the day it happened?

A No.

Q And did you question him at all about the incident?

A Did I question him?

Q Yes.

A No, I didn't.

MR. RICHARDS: I have no further

questions.

THE COURT: You are excused.

(Whereupon, the witness was excused.)

MR. CHALENSKI: I have no additional rebuttal.

THE COURT: The Government rests?

MR. CHALENSKI: Yes.

THE COURT: The Jury may take a very short recess.

(Whereupon, the Jury was excused.)

THE COURT: Does the Defendant rest, also?

MR. SHANAHAN: The Defendant Bell rests.

MR. RICHARDS: The other Defendant rests.

MR. SHANAHAN: If it please the Court, at this time, I, on behalf of Defendant Bell, I move for a dismissal of the first count of the indictment, which is the only charge against him, on the same grounds as at the close of the Government case, and now it is based upon all of the evidence of the case. There is not sufficient evidence to submit to the Jury for their determination. I move that at the same time, for a directed verdict of not guilty upon the ground that a contrary verdict would be contrary to the weight of the evidence.

THE COURT: Do you wish to argue it?

MR. CHALENSKI: No.

MR. RICHARDS: On behalf of the remaining Defendant, I move for a dismissal of all counts in the indictment on the grounds that there has been insufficient evidence to submit the matter to the Jury. In addition to that, counts ten through fourteen or fifteen, Your Honor, which actually concern interference with the selection of the representative, and the position that we take is that in and of itself, the representative was certified in December 4th, and that the discharge of the employees occurring after that date would have no bearing, or any way would interfer with the employees' designation, and for those grounds we respectfully ask that the counts be dismissed.

THE COURT: I deny the motions.

How long do you expect to take to sum up?

MR. SHANAHAN: Well, Your Honor, I will be talking first. I have reviewed this somewhat. I would think that somewhere between forty-five minutes and an hour, the best that I can judge it.

MR. RICHARDS: I would take the same.

MR. CHALENSKI: I would expect between thirty to forty-five minutes on direct, and whatever rebuttal is necessary. I would not expect that to be

substantial. POssibly another twenty-five or thirty minutes.

THE COURT: We will sum up tomorrow then, and that will give you a chance to get your notes in order.

(Whereupon, the following took place before the Court and the Jury.)

THE COURT: Ladies and Gentlemen, both sides have rested and they have requested time to pull their thoughts together before making their closing argument. So we will adjourn for today until tomorrow morning at ten o'clock, at which time the Counsel will make their closing arguments, and depending on what time they finish, the Court may or may not instruct you on the law and submit the case to you.

We will have to see how long it takes them to finish their arguments.

So you are excused now until tomorrow morning. Don't talk about the case and don't let anybody talk about it with you. At this late stage, we don't want anything to happen.

(Whereupon the Jury was excused.)

THE CLERK: Court stands in recess until ten o'clock tomorrow morning.

(Whereupon, the proceedings were recessed

at 2:30 p.m. until ten a.m., the following morning.)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

Plaintiff :

-against- : CRIMINAL NO. 75-CR-83

JERRY WINSTON, BROOME COUNTY AVIATION, INC., COMMUTER AIRLINES, INC., and THEODORE (TED) BELL, :

Defendants :

----------X

CONTINUATION OF PROCEEDINGS in above-entitled matter, came on before the United States District Court, Northern District of New York, at Auburn, New York, on June 16, 1976, at 10:00 a.m., before the Honorable Lloyd F. MacMahon, United States District Judge.

VOLUME XII

A P P E A R A N C E S:

The Honorable JAMES M. SULLIVAN, JR., United States Attorney, Northern District of New York, Federal Building, Syracuse, New York, by ARTHUR A. CHALENSKI, ESQ., Assistant United States Attorney, Of Counsel.

- and -

BECKER, CARD, LEVY & RICHARDS, P.C., 141 Washington Avenue, Endicott, New York 13760, Attorneys for Defendants Jerry Winston, Broome County Aviation, Inc., and Commuter Airlines, Inc., by RODNEY A. RICHARDS, ESQ., Of Counsel.

- and -

PAUL R. SHANAHAN, ESQ., Syracuse, New York, Attorney for Defendant Theodore (Ted) Bell.

THE COURT: Mr. Chalenski, you may proceed.

MR. CHALENSKI: Good morning, Ladies and Gentlemen: It has been a long time.

My job now is to discuss the evidence that has been presented in this case. The Judge will discuss the law and that will be done in the Charge to you that will follow the summation by me, and by the Defense Counsel.

First, there has been a lot raised at the trial, a lot which hasn't been really relevant to what this case is about. What it is about is whether the employees of Broome County, and Commuter Airlines, can have the freedom to choose whomever they want, whatever union they want to represent them, whether it is an in-house union of the Teamsters, or the A.F.L.-C.I.O., but that is not what is important. What is important is whether these eight men who have been fired and have testified before you were given the right to choose the group that they wanted, and they weren't. The Defendant stopped them from doing that. There is no question about that in the evidence.

First, there are only fifteen counts that you are considering, because the Government has dismissed or moved to the Judge, to dismiss two counts.

There are three types of wrongful activities that are mentioned in the indictment. The first count is the conspiracy count. That alleges that the Defendants interferred with, influenced and coerced their employees. Those three words are used in every count, all fifteen of them.

The remaining fourteen, outside of the conspiracy count, it is all by discharing an employee because of his union organizing activity, and the conspiracy count too, additional elements have been mentioned, that he interferred with and influenced and coerced employees by threatening with reprisals if they sought to organize, and by soliciting their ballots, making them vote right in front of him, right in his office.

Now, you recall the tape that we played, one hour and some odd, of mostly extemporaneous talking by the Defendant, including a prepared statement by his attorney.

That was before any election activities began, before the heat of the battle started and the Defendant is asking you, if nothing else, to believe that the remaining statements that he made after that, two weeks later, after a union election was already in progress -- no way, but in any event, the statements

made on October 5, 1974 were threatening in themselves. You will have the transcript, and the tape was played before you. Look at the atmosphere that it was played in. Three employees fired just two days before. Each and every one of those co-pilots knew of the organizational activity of Mr. Slough, Mr. Josephson and Mr. Baan.

The Defendant knew it, too. Being a person sitting in a meeting listening to the president of the company and its chief operating officers talking about layoffs, and firings, and 30,000 people out of work, knowing that just two days before three of his co-employees had been fired just like that, because they had been present and had started organizing a union meeting.

You can talk about firings and layoffs, and what a union is going to do to this company. That is when it started, right then and there. That is when the first threats came to these employees, and that is when they started knowing what would happen to them. That is, if they continued their organizational efforts.

I am not going to read everything that I read to Mr. Winston yesterday, but I am just going to read parts of what I read out of this transcript.

'You are all aware that we bid on

Citation, a contract with I.B.M. for a Citation, $850,000.00 for an airplane. We got to go out and borrow it, and then we owe it, and we got to pay it back and if we don't pay it back they'll chop our heads off, sell all our airplanes off and we will be out of business. That's the way it works. I can tell you right now, with the news -- ', and what news is he talking about? Is he talking about an abstract cutback in the economy? Is he talking about an I.B.M. contract being lost down in Washington someplace? He denied tnat later on in this meeting. Is he talking about apublic loan contract for a couple of thousand dollars being lost? Is he talking about a union coming in?

'I can tell you now, we can pull our neck right in and I'm not going to do it. All because of the news here. I'm not going to expand it in fact. I am not going to buy that Citation. I can't afford to take that risk. Economic risk with an unstable organization internally that will try to dictate the economic policies of the company.'

He was talking about a union. And tnat union, and what it would cost him in the company. He stated by saying that I am not going to expand and do anything because of the union, and he told you on

the stand that he lost the contract for the Citation because he bid too high. He told the employees he was doing it because of the union. All because of this, I am not going to do all, because of the union and I am not going to do any more.

Remember him saying about the Metro? He was going to put two Metros up in mothballs. What does he tell his employees?

'I want to order another Metro before the end of the year.' Do you want three in mothballs?

This is on page twenty-two: 'They have given us the money to buy these airplanes and are willing to give us more providing tne Metros that's already negotiated to buy tne Metro and order before the end of the year. '

He wants a lot of mothballs.

In 1970, there was a two year depression, in the aviation industry, and there were laying off pilots like crazy.

'All over the place, and we won't do it.'

He just laid off three.

'And as I say, we have prosperity here.' Nobody got laid off? Everybody grew? We bought more equipment? I would say that the company is pretty progressive.

And what about policy? What about our policy on equipment? On laying off? Our policy on growing? What our policy is in the future is going to again depend on yourselves.

There is no condition any place in that first meeting on there being a contract that was entered into first. Just on the union coming in. Internal stability. If the union gets in here and gives us any instability, I have got the option. Quit and not expand. Close down. Throw out his entire way of addressing these pilots, and start in October 5th, 1974, and it didn't end there but it continued through October 19th, 1974, and it continued through the individual meetings with pilots.

You heard Douglas Ton. He wasn't -- he was our fifth witness and you heard him testify that at a later meeting, Winston said he would pull in his horns and drop the less profitable routes. That he could padlock the doors. Mr. Hummell, he testified with his notes -- sure, there was some mention in the beginning about this Golden West Contract, but then Winston goes through a bunch of options that he may have: to padlock the doors, pull in his horns, and to retire.

He said those things with reference to a union coming in, and on October 5th and he said the

same things with regard to the union coming in on October 19th.

Even his own witness, Don Reeve, was asked about what is this discussion with reference to a contract or to the union coming in? Don Reeve said that there is no difference, and there isn't. The Defendant said, or is trying to say that he conditioned it before he entered a contract. What does a union do when they first come into any place? The first thing they do is: here is a contract. Let's talk about it.

The Defendant is saying that the first thing that the union does in any event is going to give him the option to pull in his horns, retire and close the business down and cut the roots. The Defendant is keeping all of the marbles in this game. Telling his employees that if they vote for the union, this is what I can do: I can put you out of a job.

You have to remember the status that these pilots were in, subject to the whims, caprice, the slightest desire on the Defendant Winston's part to throw them out the door.

Some of them have been long term employees. Some of them have been there five or six years. Mr. Williams had been there seven years, and some others had been there longer.

It was their jobs that were concerned, and when your jobs are on the lines you listen carefully and you read between the lines.

Defendant Winston wasn't even careful to keep things between the lines. He laid it right out up front, where each and every one of you can see and read through this, and remember what the witness said. Those witnesses were taking their jobs in their hands in voting for the union, and that it was no longer their choice, that it was Winston's choice of what would happen to them.

The same thing individually. You heard Mr. Solberg testify that he was called into an individual meeting with the Defendant Winston, that Winston said he was not going to have a union representing his employees and that he hoped that the pilots would not join. If they did, he would close the door, sell the airplanes, and they would be without a job.

Mr. Sholl testified the same type of thing. An individual meeting with the Defendant Winston. The Defendant Winston said if the union got in, he would close his doors, move to Florida, or cut back on a couple of flights a day. He told Mr. Sholl there was always a job for those who are faithful.

How about Talbot? Soliciting ballots?

Can you believe being asked to vote right in front of the president of your company and that is just what giving the ballot in, in a National Mediation Board election means. Called into the office and give him your ballot. You know that giving your ballot up means a no vote. There is a sign in the operating office saying that the instructions that you get with the ballot say that. The Defendant Winston knows that. You know he knows that. You know that if you keep your ballot it hints that you are going to vote for the union and if you give your ballot up to him, he is going to vote for himself. Is that a secret election?

'Will my ballot be absolutely secret? Will anyone know how I voted? The answer. The United States Government will have full supervision while the balloting is going on and will protect you from interference, prying or threats by anybody. Your ballot will be absolutely secret.'

That is the Defendant Winston speaking. What a hypocrite! What does that mean? Doesn't he pay any attention to what he says? He calls each and every one of his employees into a meeting with him and what happens?

Briggs: Winston said to him, this is one way that I know that you will not vote for the union

if you give me your ballot. Might you get in trouble? Sticke with me, there will be no trouble.

Mr. Solberg: Winston said to him, 'I want your ballot.' Mr. Winston said to him, 'Show me your support by giving me your ballot.'

He said to Mr. Ton during November when he was going to vote for the union or remain non-union: he told Mr. Ton, 'You do things my way and you are going to benefit.'

That is, the second ballot that was sent to him, and before the election you heard Mr. Ton testify, 'You gave me your first ballot -- you won't mind giving me your second ballot.'

Mr. Williams: You heard him testify. Mr. Williams called him in. 'You can show your loyalty to me.'

And what happened? First let's look at the circumstances under which those things were said. Look at where they were holding the meetings? Right in the office of the president of the company. This wasn't any informal conversation, a foreman coming out with some employees saying, 'How are you doing, and how are things going?'

You were called in, summoned to the president's office. He wanted to talk with you. Set

you down in a chair across his desk and gave you a little lecture. The president, himself, did this in all cases. Made sure that the most effect was obtained when you were called in to discuss your ballot.

What was he doing? He was asking for your vote. Look at the background of hostility. Three employees had already been fired. Mr. Slough organized the meeting on October 2nd; Mr. Josephson helped organize it; and Mr. Haan spoke out at the meeting.

Were the answers truthful? Isn't that one of the best indications of whether there was coercion at the time that the ballots were given up? Thirteen, maybe fourteen, maybe more gave the Defendant their first ballots. Remember, twenty-one were eligible to vote. Mr. Briggs gave him the ballot. Mr. Dolan, Mr. Excell, Mr. Floto, Mr. Herrington, Mr. Johnson, Thomas Lewis, Mr. MacDouglad, Mr. Pusztai, Mr. Solberg, Mr. Ton, Williams, and three weren't even able to vote in that election. There are only seven left.

Mr. Winston testified -- you saw Mr. Reeve testify and weren't you a little suprized that he voted in the election in the first place?

Mr. Fairchild: Mr. Winston couldn't remember whether or not he gave his ballot up.

Mr. Leonard: Defendant Winston could not

remember whether Leonard gave his ba lot up. Who else do we have? The four that were subsequently fired.

You have Sholl. He didn't give the Defendant Winston his ballot. He told him he had already mailed it in when he was first called into the office.

Bill Lamos: He told the Defendant Winston he thought his vote was a private matter. Nobody's business but his own.

Mr. Larimore: He told the Defendant he had already mailed his ballot in and he did what was best for the company, his family and himself.

Mr. Hummell: He never gave Mr. Winston his ballot and said he didn't have it and never got back.

And what happened? They went to the other thirteen, and I named you the ones who gave the Defendants their ballots: these are duplicate requests for ballots. They turned right around and asked for more ballots. By giving their ballots over, the understanding was that they were voting no. They had to let the Defendant think that. Their jobs were in jeopardy. They turned around and got duplicate ballots. There wasn't supposed to be none.

Richard Dolan: Duplicate ballot.

Paul Floto: Duplicate ballot.

Hugh MacDougald: Duplicate ballot.

Remember, MacDougald was on the stand, and both sides of the fence. He tells you that he gave his ballot up voluntarily, and all for the company and turned right around and asked for a duplicate ballot. Here is MacDougald.

Jan Solberg, Thomas Lewis, Ronald Williams, Paul Briggs, Gerald Excell, Michael Kleitz, Peter Johnson, Douglas Ton. They all lied. They all told him that they were going to vote for the company and turned right around and got duplicate ballots, and you can check the list of the persons who voted, and they cast votes for the union. But they kept it secret. They have lived to protect their job. They came in under coercive circumstances, and if they didn't lie, they would have lost their job. Those who told the truth, did lose their jobs.

Let's look at those who did. The meeting on October 2nd, 1974, only three persons stood out. There was a lot of the pilots and co-pilots -- of course, you can't fire your whole staff but you can pick out those who seem to be the ones who are the ring leaders. By getting rid of them, you have obtained the most effect on the remaining employees. You nip it in the bud. You get rid of Slough, the guy who organized the meeting and got Calder, and stood with

Calder and got him in there.

Josephson who stands with Calder greeting people coming in.

Baan, a fairly new fellow but happened to make a mistake of speaking out at the meeting, and the only extended discussion that anybody seems to be able to remember.

All three, twenty-four hours later, fired just like that.

Is there any doubt, any doubt at all that what happened at that meeting got back to the Defendant at the very minute that that meeting ended?

Robert Slough told you, he told Herrington a couple of days before this meeting. How do you find somebody who is a spy? By finding out that the truth filters back? Well, you know who knows the truth. You have got to give somebody specifically wrong information and see what happens to that wrong information. He told Herrington that this letter that was circulated among the pilots, dated September 24th, 1974, was written not only by himself, but by Gary Leonard, and Del DeLaurentis.

And when does he next hear that lie? He told that lie only once, and when was it next related to him? Ted Bell, the morning of his firing, the day

after the meeting said, 'I don't know anything about that letter that you and DeLaurentis and Leonard wrote. I don't know anything about that. You are not being fired because of that.'

How did it get to him? Only one man, and that man was at the meeting the night before and could give the Defendant Bell that information. It was only told to one person, John Herrington.

Costing money? I don't know what it was supposed to amount to. It was talk about some discussion among the pilots to cost the company money or take steps to cost the company money.

A strike, in any event? But it never materialized. But the important thing is that the Defendants knew about it. The Defendant had somebody in the camp of their employees, all through the whole affair, reporting right back to them everything that happened. Every discussion that took place, who said it, when they said it, and what it was about, and wnat the intent of the pilots were.

Larimore -- fired. Among other reasons alleged that he told, who else? He called Winston a name. Herrington? That filtered right back. Is there any doubt that all of this information was filtering right back to the Defendant as soon as it happened?

Any doubt whatsoever?

There is too much evidence in the file that these Defendants knew everything that their employees were doing. The Defendant Bell had charge of the daily operationsof the company, and the day to day meetings with the pilots. He saw them continuously. He suggested that the pilots attend the meeting, and see what they have to offer. He said that that was the last word that he had on the subject. Was there any reason that he wouldn't be told, or kept from this information as he so strenuously insisted that he never knew anything about it? Can you believe that he didn't know anything about it?

Let's look at the firing of Robert Slough There was only one reason for that firing; one reason that has been brought out in this courtroom before you that has got any weight whatsoever. He was a union organizer. He started the ball rolling. He started that letter of September 24th. He is the guy who got in touch with Calder, and he heard Calder testify to that, and Bob Slough testified to that. He arranged a meeting, and the hotel room where it was held. Everybody saw him. He was the prime mover. He was the guy that you had to get rid of if you had any chance of stopping this.

Calder thanked him for everything done at the meeting, 'Thanks, Bob,for getting us going.'

The Defendant said that the layoff of Bob Slough was -- this blackboard is not going to work and I think it will make things clearer if you can see this while we are talking about it.

(Counsel placed a chart on the blackboard.)

We have the 'Kitchen sink syndrome' with regard to each one of these firings. First it is alleged that the firings were because the employees, some employees had to be laid off, and then when somebody was selected, the kitchen sink was thrown at them. Any possible thing that can be dragged out of somebody's employment for six months or a year, or three months, or any period of time that any of us have worked at a job, is dragged out and cited as a reason.

Nothing in the record, nothing in any employee's files. If the Defendant put in one sheet of paper from the evidence, outside of that one letter of August of 1974, which I will get to, to support their statements that these employees were not good employees? No. But they did throw back to a layoff. It was a reduction because of economic reasons.

'We fired them not because they were bad, because he was bad, but because we had to get rid of

some of our employees.'

This chart right here traces -- well, what is does, you heard John Levan, special agent of the F.B.I. testify that he made this. He took only those employees who were with the company on August 2, 1974. Anybody who had terminated employment prior to that date is not named in this chart.

By the way, there is one name here that is William Potterman, who is actually a pilot, and I questioned Defendant Winston about that pilot, and it should be up here.

But only employees with the company on October 2, 1974 or on the chart, and that is so that you can have a good comparison of how they stood relative to each other and the chart goes to July of 1975 so you can see who was hired after that, and you get a correct idea of running up and down these lists and you can see when somebody left, and when somebody came on. They were taken from the payroll record of the company.

Mr. Levan testified that he went through the payroll record, and he did see only salaries and not positions, and he took anybody who was making a pilot or co-pilot's salary and categorized them as that. It would not include people who worked there less than a week. They did not come up to a pilot or

co-pilot's salary for any week, and they could not be included. Okay.

Michael Baan was fired, and it was only a short period of time, and a couple of weeks, and the first payroll record shows him starting September 1.

Let's look at Robert Slough, right here. He had been there six -- no, well, about late May or June or so in 1975 he was terminated. He was terminated right at this point (indicating). Right here, these three guys that came on just about the same time, Michael Baan had, and only a month before Douglas Ton had come on, and only a month before Peter Johnson had come on, and only a month before Ivar Ore had come on.

Economic reductions by getting rid of the guy who has been there six months when you keep other fellows on who have been there only a month? No. This Defendant knew that seniority bit. They got rid of Michael Baan, they claim, because of that. Of course, that same reason didn't hold water for the others.

Skip ahead to Josephson, and look at him. Only four co-pilots with more seniority in the company than Josephson. Three, Johnson, Ton and Ore.

Still only three or four weeks seniority with the company at that time.

If you are cutting back because of

economic reasons, do you fire guys who have had that much seniority or guys who just came on and you have expended no money on them and not trained them, and have done hardly anything with them? You keep them because they haven't started to form a union.

Let's go on to that character assination job of Robert Slough. Reasons for the firings? He fired him because Kleitz and Reeve said that he has poor radio procedures. Reeve took the stand and never said that he had poor radio procedures. Michael Kleitz wasn't even asked.

Bad attitude? What is that? That means that you are interested in the union.

Availability? Not available twice. He went on to see an ophthalmologist both times to get his eyes checked because his license required it. Both the Defendants Winston and Bell -- Defendant Bell said, 'Sure, other pilots have been unavailable twice. That is no big deal,' and Defenda Winston said, he assumed so.

Money not in the envelope? How many times did you hear the allegation of money? What kind of a caricature is this trial? Sure, this is a trial.

Defendant's Exhibit -- are they all here?

He had the envelope, and he said that $60.00 was missing from it, and it is in Robert Slough's handwriting, and he says it only came in with $120.00 and somebody wrote $180.00 on it, and that was Robert Slough. Was he trying to indicate to you that Robert Slough would write $180.00 on the envelope, and then turn in $120.00 in it, and he was stealing money because of that?

He assumed it was in Robert Slough's handwriting, by the way. He tried to make a big thing, but look at the date. It was on only one that he came up with a mistake on it, and it was the day after they alleged that they discussed firing him. This is the best that they can come up with to substantiate atrocious record keeping.

Money missing. How many times did you hear that with the other fellows, that he was still reporting money missing in May or April, long after these guys were gone. I don't know whether he had some kind of phobia about money missing or what. He never tied into any one of these guys that they took any money. But he said money was missing, and did you notice that?

Overbooking one passenger on a flight. A flight at 4:15, and Defendant Bell arrived at five

o'clock with a substitute plane, and some passengers had come in from another flight, and Bell was the guy responsible for taking their boarding passes, or something like that on that date, and Bob Slough was at the front desk writing tickets for any passenger who came to the front desk. I am sure that some of you have seen tickets written in advance where some passengers go to the gate, and people who don't know anything about planes, and how it works, and they go right to the gate and things like that. Bob Slough never saw that passenger, and how can you allege that he was derelict in that? If anything, it was Defendant Bell who was out there guarding the gate at the time that that happened, but it is no big deal anyway. Those things happen.

Cash box left out. Bob Slough said he never left the cash box out. Sure it was left out, but somebody else did it.

Not cleaning the plane. Bob Slough was never even assigned a plane to clean. He wasn't assigned a plane to clean. Now, locking up at night. In Binghamton, he flew a morning flight. He only flew one late flight where it could have been locked up, and he locked it up.

Low average proficiency. He was a mechanical type pilot. At that time, they had one

co-pilot with A.T.R., out of twelve or thirteen, and you heard testimony on how difficult it is to get that. Bob Slough, one month after he was fired, got his A.T.R. He was no mechanical pilot. It is a contrived reason just like every reason in here was contrived. No substantiation in the file, and no documentation in Slough's file. Those were cooked up after the whole litigation started.

Look at that meeting of September 30th, where they allegedly decided on the name of Robert Slough. Were the Defendants consistent in their stories? Defendant Bell was put on the stand first to see what kind of questions would be thrown at him and then, later on, they have to change because a lie just can't stand up under extended questioning. The Defendant Bell took the stand and said that he decided on the name of Slough, Josephson and Baan the week prior. No, no two meetings; just one meeting.

However, he also said that he had made Government's Exhibit forty-one, this note in the file of Slough, contemporaneously with discussing firing him.

No, not contemporaneously with any of the accidents, but when they were discussing his firing.

What are the instances that he mentioned? The third one didn't happen until Monday. They were

fired on Thursday, and the incident happened on a Monday. That was a plane incident in Elmira where a passenger was over booked. So that fabrication, the week before the meeting never took place; it couldn't take place.

Well, they had some dual problems because of the letter of September 24th, 1975, Government's Exhibit twenty-three, the one that was circulated to all employees of the company, and composed by Robert Slough and it said in part, 'Most of us have suffered tnrough the embarassment of being a co-pilot at Commuter Airlines only to find that the Captains are not much better off.'

This letter was drafted by a co-pilot. It is obvious. The co-pilots were beginning to organize, and the co-pilots were the ones where the action would have to be taken to stop it. Any decision to fire co-pilots after the date of this letter would have been an obvious interference. So he had to pre-date the decision to fire the co-pilots, and they did this by fabricating the one meeting that Defendant Bell had talked about. He said they decided to fire the seven co-pilots on September 20th, and that this decision not to fire Robert Slough wasn't made until the 30th. You do believe it?

It is reasonable to change a story. It is plausible.

This is the Defendant's Exhibit C, which I offered into evidence. This is the letter or the memo that Bell says was made contemporaneously with the firing of Slough and he said it is in his handwriting.

This letter, and I read it to you yesterday, you heard that he was positive that it was the summer of 1974 that his son, Mark Winston, gave it to him, before he left in August of 1974. The letter was given to him the same day that Mark Winston told him about these alleged defects in Robert Slough. That letter was given to him in August of 1974. But the letter mentioned items that happened in September of 1974. Was Mark Winston -- has he got some kind of capacity that the rest of us don't, to see what is going to happen next month? Did he have the capacity to see that ?

This was in June and he didn't call from Rochester in June. He wasn't flying in Elmira in June. Robert Slough didn't see the cash box left out in Binghamton. The Defendant Winston testified that he didn't start Elmira operations until September 3rd, 1974, the first chart that we have got. This is a fabrication.

No notes in the file. Bell testified that anything in the file that is important, is put in the file.

The layoffs. No recall; no employee was laid off. You heard the Defendant Winston said that employees that were laid off, that Slough, Josephson and Baan, and Mr. Hummell and Mr. Larimore. They weren't laid off because there was anything wrong with them but there was a lot wrong with them, anyway. None of them were recalled.

Look at here. Pilot before December of 1970, look here. Just a little over a month after Slough was let off. Did they recall him? No. They put Potterman in beginning February of 1974. Did they recall Baan? No.

And all of these five co-pilots here, hired right in a row. They have run themselves out of co-pilots. They had used the pilots who were coming on as co-pilots as long as they could, and they had to promote them to Captains. They never got down to the seven co-pilots that they said they would.

Look at this: one, two, three, four, five. This guy, Allan Gerrin was hired as a part timer for just about a month, the beginning of June and you heard he went on to full time.

Look at here. From the first week in May, how many co-pilots? They had on Dolan, and Fairchild, and Peter Johnson and Gary Leonard.

I won't name these, but you can count them. One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve. Sure they did a good job of getting down to seven co-pilots. You got rid of seven co-pilots is what they did. They never got down to seven co-pilots.

Reduction in the force? On October 3, 1974, when they started this big reduction in force the only thing they did was get rid of the three union organizers. They didn't get rid of planes or any of their other staff, and mechanics and linemen, and none of the office staff. They didn't cut any of their roots. They didn't do anything on September 3, 1974 except call three pilots in and say, 'Git, right now.'

No notice; no warning.

What about Ira Josephson? There was one note in Ira Josephson's file of January of 1974, and I forget what it was. The Defendant didn't put it int evidence. They didn't think it was important enough. Kitchen sink. My gosh! Those things that they threw out at Ira Josephson. He was the fifth most senior employee, and all of a sudden they want a reduction

in force so bang, their fifth most senior employee goes. A guy who had nothing in his file to substantiate any wrong-doing; one little item almost a year before. Do you let that guy go when you are cutting back force? No, you don't let a guy like that go. You let guys like Johnson and Ton, or Ore, guys that have been there only a couple of weeks go.

I am not going into each of the reasons for Josephson.

Michael Baan. Well, the reasons -- I guess I should. The real reason was he spoke up at that meeting. He was at the meeting, he was an organizer, and he stood next to Alex Calder. The employees, whoever was there, and whoever was looking out, and whoever was planning to report, went on back and looked at that and noted it. He was there to observe, and he helps himself with the company and reports what he saw, and what he could get, and what he got was Ira Josephson looking like an organizer, and that is why Ira Josephson was fired, and not because he wasn't keeping up any book or any air Canada book, or what else. Not a good attitude and didn't get along with employees of the company? Not one shread of substantiation of any of those reasons is in the file. Not one single shread.

Remember that flying with Mr. Solberg

incident in Newark Airport where Ira Josephson didn't want to take off because of a thunderstorm and they closed the airport? It was so bad that they closed the airport, and they were not able to take off. That was in the Spring of 1974; six or seven months previously. Do you cite that as a reason for firing somebody who has good judgement?

Michael Baan. The only reason he was laid off is because he spoke out at the meeting. That wasn't the only one. There was no other reason to get rid of him. They said they didn't want to cut back their pilot staff. Just the only reason for him.

Mr. Sholl. This is a slightly different argument. Mr. Sholl was involved in an incident where he dropped a door of a Metro, and the door free fell out of his hands, and some damage occurred.

Michael Kleitz. You heard Michael Kleitz testify and do you remember? He is an employee and has been employed since 1970 or 1971 at Commuter, and a Captain for the last couple of years, and he has been doing well there. Michael Kleitz doesn't have a thing to gain by testifying before you.

He has everything to lose. He told you that when this incident happened he was in the plane. The Defendants are saying that Michael Kleitz didn't

feel what happened. Michael Kleitz -- well, the door was damaged, it was bent, the handle was broken off, and there was a big bang and Michael Kleitz told you that he felt it. Is there any doubt about it? He said he radioed in and told some girl in the office what had happened. He saw the mechanics come out and he heard Sholl, and he was scheduled for another flight at that time and could only be there for a short period of time, but he heard Sholl tell the mechanics that the door had free-fallen.

Now, the mechanics didn't know much. Mr. Maize could not remember much of what went on. But look what happened. The Captain is responsible for the flights and the first thing he did was taxi the flight back to the hangar and the door was inspected and the plane was taken out of service then. Everything happened that should, in that case. There was nothing wrong. The door had free-fallen. Briggs, the guy who went to ground school or conducted the ground school had one fall on him three months before, and he was with the company. Before the election, before the union election, and about this time, just look at all of the accidents that the employees of the comapny had with the planes. Were any of them fired if any of them happened back in 1970? But look at Herrington. He landed, and I don't

know what was going on, but Herrington said it was not intentional, and do you remember that incident?

'I didn't mean it.' But he sure did something wrong. Art Warner said the gear was up. I don't know how the gear got up. I don't know if it was just left up or if the light wasn't checked and they landed on the belly of the plane on a runway. And he was with the company, and he stayed with the company. He was suspended from passenger operation for thirty days.

Some passenger complained about a flying technique. It wasn't substantiated and he wasn't suspended without that. It was the only guy that Paul Briggs ever failed on a check ride. Herrington owed the Defendants, and he owed them big. He wasn't fired.

Pusztai. Well, he couldn't see where he was going. I can just imagine telling the police officer about the accident, that my window was fogged up and I couldn't see where I was going and I went ahead anyway.

Briggs. That was another instance of damaging a plane. He was negligent, and remember the Defendant Winston was saying that. He didn't put the brakes on or something, and was Briggs fired? Briggs was a fair-haired boy at that time.

A few weeks ago a door free fell on an employee again, and no firing. The only guy who was fired was Sholl. Sholl was fired because he didn't give his ballot to Winston. He was one of the four guys that Winston had reason to know was a strong supporter of the union.

Other employees with similar circumstances doing for worse damage to the palnes were kept on.

Quickly, on the snubber. Briggs, and do you remember he testified he had nineteen years of flying, and he heard of the snubber failing only three times. One with him, once with Leonard, and once with Sholl.

Thirty-seven pounds. I would be willing to go with that figure. When you have three feet of door out there moving along a path with thirty-seven pounds, and it is much more when it builds up speed, and can you hold a chain on a door that he knows at least has free-fallen once in the last nineteen years, and that door is building up speed, and can he hold onto the chain and not be dragged out? He has his hand on the door opening it on the one side. He is not grabbing onto a rail, and you heard testimony that Defendant Winston pointed out about the chain in his other hand, and he was holding on like crazy with just

his feet, and he is supposed to stop a free-falling door that has got all of that momentum built up?

Kleitz went in to tell the Defendant Winston after it happened, what had happened, and the Defendant Winston said, 'I know all about it.' He sure did know all about it. He knew what he wanted, he knew that he wanted to get rid of Sholl.

The only reasonable reason for getting rid of Sholl was that he was a union sympathizer. He did not give Winston his ballot, and he was one of the four persons that Winston can point to who didn't.

The next guy that we can point to who didn't give Winston his ballot was Bill Lamos. He was in Mexico on December 13th, 1974. Kleitz, at that time, was another fair-haired boy, and he said that the Defendant Bell had spoken to him because just a couple of days before, and said that they were going to find a reason to get rid of Lamos, and they did. They provoked him. They had him flying -- having his passengers late for a couple of weeks, and then to test fly a plane on a fifteen minute rest stop. Did the Defendants point out any one instance in the entire history of that company where a pilot had been asked to test fly an airplane in a fifteen minute rest stop? Not one instance did they point out, except Bill Lamos. Bill was an

honorable man. He refused, and they knew he refused, and they expected him to refuse. They were going to give him that kind of stuff until he broke. He wasn't fired. Excuse me, he didn't quit, he refused to do it, and they fired him, right then and there. There was another available plane. The plane Lamos was supposed to test fly didn't pass the flight. What is the story about it is the only available plane they had? They took that, the other plane, out to Elmira. It was there. The plane Lamos was supposed to test fly was not even the one that did make the flight.

Mr. Williams. Ronald Williams, fired January 9th, 1975. He was the guy that was -- remember the Defendant Bell -- Williams was an organizer. A little bit of a rebel rouser all of the way through. An organizer on October of 1973, and this would be kind of an important meeting. The Defendant was saying that in October of 1973, and nobody seems to recall it, but that they decided on a three-year wage increase, and at the end of three years if you didn't make captain you would be out. The only guy who recalled that was McKinley. And McKinley said he didn't get it from that meeting of October, 1973, he got it from a private meeting, and I think it was with Bell.

In October of 1973, Defendant Bell

testified that Williams had already been on board for five years, and a full time pilot for three years, and came on as a full time pilot in October of 1970. And Williams was happy with that deal. He was really glad that all of a sudden he was put in a position where on any day, the Defendants would fire him. It was a crock, and it just didn't happen. Williams is not that kind of a guy to sit there and smile while somebody is telling you that you have got your three years up and we can fire you any day we want.

But -- well, no requirement. But he did go out and try and get his A.T.R. You recall that. Williams started to get his A.T.R. about -- well, he left sometime about the beginning of March or early June for his A.T.R. and I think that Larimore was on there -- no, not until about July of 1974. It could be that no pilot at that time had their A.T.R. -- there was no evidence about that.

Williams went down to Florida, and spent $3,000.00 of his own money and tried to get his A.T.R. He passed the written test, and spent five or six weeks there. That is an awful lot of devotion. Try and advance yourself. He was not able to pass the flying test the first time down there and came back, because he could pass it in Rochester and he asked the Defendant

Bell for help. He got nothing but a big run around. Bell was not interested in helping him. Was this company interested in getting Williams ahead? No. I think that the most that has been testified to , there was conflict about that and that was that Bell made a contact with somebody who owned a Piper airplane, a twin engine Piper airplane for Williams to practice on. There was no testimony of a follow up. Williams had to somehow show him that his family was a good family before the guy would let him fly it, and it never came about. The Defendant did not help him to get any flying in. Ten percent off? That is a great rate to practice on the Defendant's planes. This is interest in your employees, trying to better themselves?

Well, the kitchen sink syndrome with Mr. Williams, too.

Money again. Money was displaced while Mr. Williams was around, and the inference was that Mr. Williams is a thief.

He was late; late. One note in his file, again, and not even -- the Defendant didn't even bother to put the note into evidence. He was late in January of 1974, a year before he was fired. They assigned him to the dispatcher-coordinator position in Elmira -- well -- there is an exhibit here. Here

it is.

He was continuously late and they decided to put him into a position, and he has been assigned as morning co-ordinator- dispatcher, and this is Government's Exhibit twenty-five. His normal hours are six o'clock in the morning until three o'clock in the afternoon. And in general, he will fly flight 150. Put a guy who is chronically late on a flight starting at six o'clock in the morning -- excuse me, a six o'clock job?

A run in with the President of some company, and you heard Williams say that the president apologized. I don't know what it was, but apparently there was some mistake. The president apologized to Williams, and Winston either knew about that, or had already made his mind up and didn't care.

Poor record keeping. I saw nothing to substantiate any poor record keeping, and I saw nothing to substantiate any of the slurs thrown against Mr. Williams.

Nothing to substantiate any of the slurs thrown against any of the other pilots.

The real reason Williams was fired was he was a union organizer, and came in and he obstinately told Winston that, 'I will give you my ballot, but, you

know, we can get more,' and Winston stood back and was quiet. That was the first time that Winston knew anything about duplicate ballots, and he heard it from Williams, and Williams said if that is all you want from me, I am not going to fight you, but I am going to get more.

This whole bit with the A.T.R. is more ridiculous when you consider that the next guy fired is the only co-pilot that they had who had his A.T.R., and he was of least value to the company at that time.

Dennis Larimore. Dennis Larimore told Winston in that individual meeting that he had already mailed his ballot in, and what he did was best for the company and his family and himself. He is next; next on the list.

Larimore was fired February 17th or February 19th, 1974. The only co-pilot who has his A.T.R.

Do you recall Jan Solberg on the stand? Jan Solberg was a fellow still employed by the Defendants. He had everything to lose, and nothing to gain by testifying here. Loyalties to fellow employees that were gone a year and a half. He was here because he had to tell the truth and you saw him. You saw him and Kleitz. Were they telling the truth?

Bell, a couple of days before Larimore

was fired, told Solberg, 'Speak to Larimore. Speak to him, he is becoming too vocal in his support of the union.'

I don't know if Larimore did anything in between, but he went pretty quickly.

Were less senior pilots fired? No. Johnson, Ton or Sholl were there, all through it?

One reason, they now could afford to let two pilots go because just the week before they hired Potterman as a pilot performing as a co-pilot, and Mallish, another pilot who performed as a co-pilot. You call is phase three in effect now. We have enough pilots performing co-pilots' duties, and we can get rid of a couple more and keep the pattern going.

Mr. Richards, I have looked in your file and I cannot find the original of this, (Indicating)?

MR. RICHARDS: I don't know.

MR. CHALENSKI: That is Exhibit forty-three.

May I substitute this for Exhibit forty-three, Your Honor?

THE COURT: Yes.

MR. CHALENSKI: It is a copy.

There were three pilots, Johnson, and Ton, and Ore and -- well, you can see right here, and look back at the file, and what was the most recent notes

on any of the guys, and the third one, Lewis, who was hired at the same time as Hummell and Larimore and in Lewis' file, you have first officer Tom Lewis was scheduled for flight 150 at 1800 o'clock and he didn't show up for the flight. Had to call first officer Ton for flight. Departure delayed twenty minutes.

Did they say anything as bad about that, anything that happened here? Another note in Lewis' file, that he went on unauthorized leave of absence and it was to be for two days, and a call that he wanted further leave of absence. Did not call, and stayed away two weeks.

Lewis was kept, and just two months before or a month and a half before. And look at what was in Lewis' file.

Do you believe that the reasons cooked up for Larimore and Hummell were even near that? Any rational basis to this choice, other than that Larimore had told Winston that he had voted and done what was best for himself and his family and the company?

Hummell didn't give Winston his ballot, and that is why Hummell was fired. He was the last of the four that Winston knew about. Fired the same time Larimore was, and they were able to fire him because they brought on two new pilots to perform co-pilot

duties for a couple of months. Lewis stayed over Hummell even. The whole kitchen sink again.

More was mentioned with Hummell. Insinuations that money was missing when he was there. No evidence, no direct statement that Hummell took money. You heard the Defendant Winston: money was missing. He didn't go any further. He didn't dare. He wanted you to think that Hummell was a thief.

Lateness. Nothing in the file. Not available for duty; nothing in the file. Missing tickets; nothing in the file. Uncooperative -- the only way he was uncooperative was because he wanted a union. Arguing with the staff, and nothing in the file and nothing to support any of these.

The real reason was that Hummel was the last guy who didn't give Defendant Winston his ballot. Any doubt?

All of these firings with a clear pattern. If there were three firings on Thursday morning, the Thursday morning massacre, and down through the other five. The union sympathizers; nobody else fired.

Williams, an organizer, told Defendant Winston he could get new ballots and for the first time the others refused to give him a ballot. Any others let go? Oh, no. Employees of less time let go? No.

Through layoff, recalled some satisfactory employees, and guys with experience? No, they wanted these eight persons out, and they didn't want them back, and the reasons for it was the union, and the reasons they brought out at the trial had been cooked up since.

The first count does allege a conspiracy, and I will take up that for a second. That requires a partnership.

You don't find a case in a criminal conspiracy with any written agreement or anything like that saying the party of the first part hereby agrees with the party of the second part that we will violate the Railway Labor Act by interferring and influencing and coercing the employees or their representatives. You just don't find that.

You view it as the rest of this case in light of what they did, and what they said, and what their purposes were, and whether they accomplished those purposes.

Bell's statements. Extemporaneous statements on the morning of the fifth: flying with me. You were flying with me. I have been easy on you.

The purpose? No union. A significant contribution to the whole plan. Flunk a check ride is one quick way to get right out.

Bell fired three of them on Thursday morning and called them in hims . He gave the reasons. He cooked up the reasons at that time.

We have got to assume that after the conference with Defendant Winston that your sensibilities don't permit any other assumptions or inferences.

Bell accepted Gerald Excell's ballot shortly after this. Part and parcel of the whole affair. Standing next to Winston, arguing against the employees with Winston: first the employees with Winston's concurrence and direction. He did the leg work, and he assisted.

Told Kleitz that they were going to find a way to get rid of Lamos. Got that by talking to the Defendant Winston. He was right in it up to his neck all of the way.

Told Solberg that Larimore's union activities, you had noted, and watch out.

Defendant Bell was Defendant Winston's right hand man right from the very beginning, and right up until the very end. He and Winston acted the same way, and they talked the same way to the pilots, and each contributed their own effort and particular part to the conspiracy.

One other element of the crime is that

we have a common carrier here, and I won't be labor it. You heard in the beginning of the proof, and the pilots testified that the passengers were sold tickets for occupancy on planes to be transported to Washington and other cities where the mail was transported, and there should be no real contention about that.

Just quickly the testimony, and what did they say as a Defense against all of these things that Slough, Josephson and Baan were fired because of economic cutbacks; that Larimore and Hummell were fired because of economic cutbacks; that Sholl and Lamos were fired because of that?

The economic reasons were union economics. A union comes in and it was not goint to leave as much money for everybody else, and it said that on almost every page of this transcript; economic instability. With this thing here, the union coming in, that is the economics that the Defendant was talking about all of the time. Not some abstract problem with the economy. Not a loss of charter business. The charter business, that varied all of the time in any event.

You mentioned something about a public loan contract for three thousand or something like that, a month. That is less than two percent of the Defendant's business in any event, and no mention of what else came

his way. His balance sheets are in here and they are exhibit forty-six and forty-seven, and corporate sales, and the two corporations combined at the end of 1974 with $2,585,000.00. He is trying to convince you that a couple of thousand dollars for a public loan contract is affecting this?

This sales, there was an I.B.M. contract down to Washington, and maybe that should be dealt with quickly. He lost two employees because of that contract. That had absolutely no effect on the remainder of his operation. Ferber and McKinley, both pilots stayed with the contract. He lost at least $100,000.00 he said, but that had no bearing at all on whether these employees that were fired, who testified before, you should have gone. That was a completely independent contract, and the employees who were involved in it were terminated with the contract and quit.

Now, except that I.B.M. contract, his gross income for each of 1974 and 1975 were about the same. In fact, it went up slightly in 1975. Look at what happened. Did any of these economic fears that he is trying to convince you motivated him, take place? Tney didn't.

The gross salaries that he paid to his employees went up between the two years. He didn't

cut back any of his employees. There was only a short period of time here when he was a little bit strapped. It was tough to be consistent and laying off seven co-pilots, and to be hiring co-pilots, so you hire pilots to take their places as co-pilots, and you suffer a temporary hardship on those who were there, and you have to work them a little bit harder to make the flights. You can get it back as soon as it is over, and you think that you are clear, and you get right back up to where you were.

Those five co-pilots? It is obvious that that is what he did. No reasonable person can believe otherwise.

I will have another chance to speak to you after the Defense does, and I think that I have pretty well outlined our case, what our position is, and what the evidence is that is important. When the Defense is speaking, listen carefully to them, and see if they can answer why, why the Defendants already made the decision to layoff the seven co-pilots on September 20th, 1974, and then lied to that same group of co-pilots two weeks later, October 5th, 1974 and told them that business is growing, and that we are buying more equipment, and anything that they do about a union is going to stop that. The economic instability caused

by it is going to affect the company. Can they explain why he lied?

Thank you.

THE COURT: We will take a short recess.

(Whereupon, the Jury was excused.)

(After a short recess, the following proceedings took place before the Court and the Jury.)

THE COURT: Mr. Shanahan.

MR. SHANAHAN: If the Court please: Ladies and Gentlemen of the Jury:

I feel that I would be remiss at the outset if I did not express to you our appreciation for your attentiveness during the two to three weeks that this trial has continued. I realize that it probably hasn't been the most interesting subject in the world to sit and listen to over the duration of this time, but I certainly feel that all of you are to be complimented on the various obvious attention that you have given the Defendant during that period of time.

So, as a source of satisfaction to the attorneys involved, I realize that the Jury is making every effort to follow the evidence as it is produced.

Now, the purpose of the summation that we are now engaged in, I presume that you understand. It is our opportunity to review the evidence in the case

to point out our views of the evidence, and my purpose, of course, is to point out to you the reasons that I believe would entitle my client, Ted Bell, to a verdict of not guilty at the close of this trial.

Now, in reviewing the evidence here, as I intend to do, I certainly will not purposely misstate any of that evidence to you. The Court will tell you, however, at a later time that your recollection of the evidence is what controls, rather than my recollection of it, or Mr. Chalenski's recollection of it, or Mr. Richards' recollection. And I must say, at this time, that as I listened attentively to what Mr. Chalenski had to say there was a great deal of what he said to you that did not accord with my recollection of what in fact, the evidence was in this case. But I don't urge upon you that that was done purposely, but I would rely upon your own recollection in considering what any of us have to say and the Court will tell you that that is your duty and your obligation.

Now, I would like to, at this time, mention a few of the basic rules of law that should govern your deliberations in a trial of this sort. The Court, at a later time, of course, will charge you as to the rules of law which you must follow in arriving at a decision here, and what few matters I want to refer

to you are not done in any view of trespassing on the Court's purogative in that regard. I simply want to call to your attention some of these basic rules in order to make some of my later remarks a little more intelligible to you.

Now, in this case, this is a criminal trial, of course. This isn't a labor dispute that is being determined by a jury here. This is a criminal trial, and there are certain basic rules that apply in the trial of all criminal cases that the Court will tell you does apply in this case.

First of all, of course, the indictment in this case, the fact that these Defendants have been indicted should not be expected by you people as even the slightest evidence of their guilt of the charges for which they are on trial. And on the other hand, it is your duty and obligation to start here with the presumption in your mind that these Defendants are innocent and applying that to this case, it means that it would be your duty to presume them to be innocent of the very charges for which they are on trial.

Now, in every criminal case, and in this one, the Government has the burden of what we call the burden of proof. They have the obligation of producing evidence here that is sufficiently strong and credible

to take you from the presumption from which you start, over to the point where you are satisfied, beyond every reasonable doubt, that a Defendant is guilty, before you may find him guilty.

Now, the burden of proof in a criminal case never shifts. It never becomes incumbent upon a Defendant to establish his own innocence. The burden of establishing the guilt of a Defendant remains on the Government throughout the entire case. As a result of that, the test for a Jury to apply is whether they are satisfied upon all of the evidence in the case, beyond a reasonable doubt, that the Defendant is guilty.

After considering all of that evidence, if they remain with a reasonable doubt in their mind on the question of the Defendant's guilt, under the law, it is their duty to resolve that doubt in favor of the Defendant, and render, then, a verdict of not guilty.

Now, as jurors, you people are the sole judges of the facts of the case. You are the sole judges of the weight of the evidence, the credibility of the witnesses, and you people and you alone are the sole judges of the guilt or innocence of the Defendants here.

Now, those are the basic rules of law upon which this case and every criminal case must be

decided by a Jury.

Now, in order to fully understand this, I think that it is necessary that I mention a few words about the indictment here, because while the indictment should not be taken by you as any evidence of guilt, if, nevertheless, sets forth the charges that are made against the Defendants, and defines the charges for which they are on trial.

Now, count one of this indictment charges all of the Defendants, Mr. Winston, the two corporations and Mr. Bell, with the crime of conspiracy, and the indictments charge that, specifically, from on or about October 3rd of 1974, to the date of the indictment, which was in July of 1975, that the Defendants unlawfully conspired, and agreed to commit two crimes: one, to interfer with, influence and coerce the employees of Commuter in their choice of union representation.

Second, to interfer with the organization of employees and to influence and coerce the employees not to join, or to remain memebers of a union organization.

Now, the Government claims and the indictment alleges that this conspiracy was carried out by: one, making threats of reprisal if employees organized. Secondly, requesting delivery of National Mediation Board ballots to the Defendant.

Three, discharging or terminating employment of various co-pilots and captains.

Now, in conjuction with any charge of conspiracy, it is necessary to show that there was something more than some talk or thought of committing a crime. It is required, as the Court will tell you, that there be certain overt acts, and that those acts would have the tendency and the purpose of carrying out, in fact, some such plan, if one existed.

Now, in the indictment here, there are nine overt acts set forth, and of those nine total overt acts, only three refer to Mr. Bell, my client.

The first alleges that on or about October 4th, 1974, all of the Defendants, including Bell, discharged Josephson, Slough and Baan. Second, that on or about October 4th, all of the Defendants, including Bell again, called meetings of pilots and co-pilots at which Winston made statements against organizing, Bell told the pilots that they would have tough check rides if they favored the union.

And third, during November, 1974, all of the Defendants, including Bell, met with the pilots and co-pilots individually, and solicited their National Mediation Board ballot.

I do not remember any evidence in the

case of Bell meeting with anybody individually and soliciting any ballots, but that is the language of the indictment.

Now, the balance of the overt act, some six additional acts relates to the discharge of Sholl, Lamos, Williams, Larimore and Hummell, and it is alleged that that was done by Winston and the corporation. No allegation that that was done by Bell.

There was also originally, and I think it was referred to at the time that we opened or made our opening statements to you at the opening of the trial, that there was also mention made in the indictment of the discharge of Floto, but Captain Floto, that matter has been withdrawn by the Government, and they offered no proof on it, and that portion of the indictment has already been disposed of and dismissed.

Now, that is the first count of the indictment. That is the only count of the indictment that my client is charged with. The counts two through eight charge Mr. Winston and the corporations with interferring with, influencing, coercing their employees in the choice of a representative of a labor union by discharging Josephson, Slough, Sholl, Lamos, Williams, Larimore and Hummell. Those were all events that occurred, you will recall from the evidence, between

October 3rd of 1974 and February 19th, of 1975, a period of some four to five months.

Counts ten and eleven charge Mr. Winston and the corporations with interferring with the organizing of employees and influencing and coercing the employees not to join a labor union by discharging Josephson, by discharging Sholl. Those two events, you will remember, occurred October 3rd.

Counts twelve to sixteen again charge Mr. Winston and the corporations with interferring with the organizing of employees and influencing and coercing employees not to remain memebers of a labor organization. And then, the discharge of Sholl, Lamos, Williams, Larimore and Hummell are alleged in separate counts.

In order to get all of this in the proper perspective, it seems to me that it is necessary to understand what certain words are that I have just referred to as being contained in the indictment: that Mr. Chalenski referred to in his closing statements to you.

Now, the language is in the indictment and it says to interfere. It is in the context of 'interfere with the employees' choice of a representative or to interfere with the organizing of employees.'

Now, the Court will give you a definition

of what that word 'interfere' means in the context of this law, but I think that it is essential for you to have an understanding of it so that you can follow the remarks that I plan to make, and Mr. Richards, of course will make when I am completed.

I think that the definition perhaps that the Court may give you, and again, you will accept his definition rather than mine, I hasten to say, but the word 'interfere' as used means to obstruct or to do something, in fact, that prevents the exercise of the employees' freedom of choice.

Now, we have got the words 'influence' and 'coerce'. That is the language in the indictment that I mentioned to you, to influence and coerce employees not to join, or to remain members of a labor organization.

Now, that word 'influence' might be accepted as synonomous to persuade, and it is not in the context of this section, and I am sure that the Court will tell you that.

Influence as used here means the pressure, the use of authority or power of either party to bring about some action. It does not mean persuasion, and it does not mean merely advocating a certain action, and I think that it is essential that you get that in

your mind. Coercion, of course, is much the same. It has a sense of compelling or over riding the will of an employee.

So that I think that we have got to look at this evidence in this case in the light of what those words mean, both in the statute and what they mean in the charges that are here.

Now, I think that it is necessary, also, to understand a couple of other things that should be properly pretty basic. An employer is free, it is completely legal and proper for him to state his case against a unionization. He can even predict economic consequences resulting from it. He cannot threaten retaliation. No question about that. But he has a right to speak his position, and I think that the Court will tell you that.

An employee has the right to give his ballot to his employer, and the employer has the right to accept it as long as the employee is not coerced, within the meaning of the law, to turn over his ballot in that fashion.

Now, these ballots, I think that you have not had a chance of course, to see what these ballots are. But one of the exhibits, Exhibit thirteen is a ballot with instructions and attached to it are

various ballots.

Now, this ballot, strangely enough, does not say that you vote for the Teamsters union or that you vote against them, and that you mark it, depending on what your choice is: either you are for them or you are against them. If you are not in favor of the Teamsters, there is no place on the ballot to so indicate. The two areas for marking include 'do you desire to be represented by International Brotherhood of Teamsters, Airline Division,' and if you do, you mark an 'X' in that spot.

If you desire to be represnted by another organization or individual, you write the name of such organization or individual on that line below, and then there is a line, and then if you wish to vote -- if you wish to vote for some other union, you make a mark there.

There is no place on the ballot where you can indicate that you are voting against the representation by the union. So, now, how do you do it?

Well, there are several ways of, apparently, that you can do it. One way is that you can send in your ballot completely unmarked, and that would be counted, and then, as a vote against the union. You can simply not send in your ballot, and that would be a vote against the union.

Or you could do what some of the people did here, Captain Reeve, and Captain Ferber, and McKinley, and they turned over their ballots to the management, and that was a vote against the union.

So that we have a somewhat unusual and perhaps, for you people, unexpected form of a ballot here that we are concerned with.

Generally, too, an employer has a right to discharge an employee. He can't do it in retaliation for union activity but generally speaking, I have a right to discharge the stenographer who works for me in my office, if I feel inclined to do so. And that is a right that every employer has, and I think that we are all in a general way aware of that.

Now, additionally, I think that it is necessary for an understanding here to bear in mind certain dates that came in during the course of the evidence, but may not have been of any particular situation to you at the time.

The application for union certification that is the application that the Teamsters made to be certified as a union representative of the employees of Commuter Airlines was dated, and sent in on October 2nd 1974. You will remember this first organizational meeting occurred on October 2nd and ended, as I recall

it, sometime after midnight, but the application submitted on behalf of the Teamsters went in, apparently, earlier in the day, on October 2nd.

The election, itself, was authorized on October 25th, by the National Mediation Board. The ballots were all in, and were counted November 25th of 1974 and then, in due course, on December 4th of 1974, the Teamsters union was certified as a representative of the pilot employees of Commuter Airlines.

So that it would seem to me that the period of real concern here is the period from October 2nd of 1974, until the votes were counted November 25th of 1974.

Now, it was after that date, it was after the ballots were counted that Mr. Sholl, who was involved, you will remember with the airplane door, when he was terminated on December 9th, and Mr. Lamos, who would not test fly the airplane, was terminated December 13th. Mr. Williams was January 9th, of 1975; Larimore February 17th of 1975; and Hummell was February 19th of 1975.

Now, with this background in mind, I would like to discuss with you, for a short time here, the evidence in the case.

Now, it is essential, of course, for

the Government to establish here that certain employees were engaged, or active in union organization, or union activity and that the employer was aware of it, or knew of it. Now, in an effort to establish that, the Government relied in part on the testimony of Slough, Josephson and Baan, and I want to discuss in that sense, the testimony of those three men.

Taking up Mr. Slough's testimony first, and taking it in a chronological order: Mr. Slough told us that on September 24th, he prepared a letter, and it is Exhibit twenty-three in evidence here, and it was an unsigned letter that he said he authored, and when he completed it, he put it in, apparently fairly secretive, in the mailboxes of all of the pilots and co-pilots of Commuter Airlines. He said it was written by him alone, and it was not signed by him, and it was found by these various people in their mail receptacles.

Mr. Slough tells us that two days later, on December -- no, September 26th of 1974, he made a telephone call to the Teamsters' office in New York City and then the next thing that occurred was that he attended a meeting on October 2nd, 1974, at the Holiday Inn, so that we have the letter of September 24th, and the telephone call of September 26th, and the meeting of October 2nd, all of these things happened in fairly

rapid order.

Now, Mr. Slough tells us that he attended this meeting on October 2nd at the Holiday Inn, that the invitations to that meeting went out by telephone call by word of mouth, and none of the invitations, of course, went to anybody connected with the management. Mr. Bell was not notified; Mr. Winston was not notified, and that the -- during that meeting, the primary person was, apparently, Mr. Calder from the Teamsters office in New York City.

Now, Slough tells us that Mr. Calder, in the course of his speech, mentioned Mr. Slough by name. Now, what was the significance of that, because we come to that in connection with other people? That testimony was offered, number one, to show that Slough was engaged in union activity and, secondly, they have to further establish, of course, that the management in some manner was aware of it. That, at the least, has to be established.

So that presumably the fact that Calder mentioned Slough by name was supposed to be of some significance to us here.

Now, this letter of September 24th, that I earlier mentioned to you that I told you was unsigned, nobody, co-pilots or pilots knew where that letter

came from. No one knew how it got into their mailboxes, and it was unsigned. So the testimony is pretty clear about that.

Slough tells us that three or four days later, he told Captain Herrington that the letter was prepared, not just by him, which was the truth, but he said it was prepared by himself, by Josephson, by DeLaurentis, and by Gary Leonard. That would be three other co-pilots, and himself.

Now, today we find out from Mr. Chalenski that, Slough's purpose in this was to sort of have a test fun to find out if there was a spy, and as a result of it, they are supposed to have found out that Herrington was a spy.

Well, of all of the ridiculous things that I have ever heard, I think that that is about it, and I want to discuss that specifically a little further with you.

Now, first of all, Herrington says that he was never told concerning such a letter. That is the first thing. The second thing, that certainly would have been of some significance, I would presume, is if the letter was prepared by Slough, Josephson, DeLaurentis and Gary Leonard, what then about those people? Nobody claims, that I have heard, that DeLaurentis was ever

discharged; no one claims, as far as I know, that Gary Leonard was ever discharged.

So we have got kind of strange significance to put it mildly, as far as that is concerned.

Now, Slough goes on and as I indicated, tells us about that October 2nd meeting. And the mention of his name, and he says that Herrington was present at that meeting.

Well, if Herrington was there, he invited him. That had to be for sure, because certainly the Defendants in this case have nothing to do with the attendance at that meeting.

Now, the Government says to you as jurors that because this meeting occurred on October the 2nd, the discharge of Slough, Josephson, and Baan, the following day, resulted from the fact that they attended the meeting. Well, I don't think that that follows at all.

In the first place, in connection with that meeting on October the 2nd, that meeting again according to the testimony, some time around 8:30 or 9 o'clock started, and continued past midnight into the following morning. In order for these three men, who were discharged on October 3rd, to be in at the company office in Binghamton, it was necessary to

arrange their flight schedules the day before in order to bring them into Elmira for the purpose of their termination interview, and those flight schedules were made up, as the testimony without contradiction indicated long before any evening meeting on October the 2nd. And the machinery, the procedure to bring those people in for the purpose of those termination interviews had to be put in operation before that union meeting.

Now, remember, when you consider that, that the company was not notified October 2nd, at 7:30 or 8 o'clock, or 8:30 that there is going to be a meeting. What they are urging on us is that in some manner Herrington, after the meeting, advised the management of what had occurred in the meeting, and therefore the management was motivated to discharge those three people. I said to you that that is not in accord with the evidence in this case. Those termination meetings were arranged, set into motion by fixing flight schedules so that those persons would be in the company office on the morning of October 3rd, and that was done before that meeting ever happened.

Now, let's talk for a minute about Mr. Josephson. Josephson tells us that he attended that meeting of October 2nd, the union meeting. He says that he met Calder, that he greeted the pilots. In

the course of Calder's speech, that Calder made mention himself, of Slough.

Now, then, Josephson tells us that the next morning -- now, this is the morning of the day that he is discharged -- he says the next morning he visited with Captain Herrington concerning that meeting.

Now, first of all, Herrington was supposed to have been there. But he said that that conversation took place in the cockpit of an airplane, and they were on the runway about to leave on the flight from Binghamton to Washington, D.C., and that he told Herrington what had transpired at the meeting, and further told Herrington that he had signed one of those yellow union cards that you will recall was referred to in the evidence here.

Now, Laides and Gentlemen, that never happened, but that is the way that they are seeking to show that the activities of that meeting precipitated the discharge the following day.

Now, why did it happen? Herrington, the following day, did not have the flight from Binghamton to Washington. Herrington testified, and the flight record showed it, Herrington testified that on the following day he flew Governor Wilson from Elmira to Saranac Lake, and that he was not on any flight to

Washington. And furthermore, that Josephson was not his co-pilot on that charter flight for Governor Wilson.

So that didn't happen. Now, you wonder why, if these things in fact didn't happen, why are these epople telling you that they did. I think -- I think the script for all of this was written by Mr. Calder down in New York. That is how I think that all of this is coming about, because we know -- we know that what Josephson tells us in that regard cannot be true.

Now, if it is not true, if it is not true, why then are they telling you that?

The records of Commuter Airlines will establish it. You are entitled to have these exhibits when you go in your Jury room and you can examine them.

Let me state that further, the testimony is that on October the 2nd, the date of that union meeting, that Bell was flying a charter, and did not get back into Binghamton until after midnight, and he was flying, again, the next day, but subsequent to the meeting with these co-pilots. Herrington is off from Elmira to Saranac Lake with the Governor of the State of New York, and there can't be any question about it.

Now, what are they doing? They are trying to fit in that union meeting the day before, as the reason for the discharge the next day, and all common

sense tells us that the decision to discharge those men preceded that meeting, that the meeting had nothing to do with it.

Now, let's talk about the discharge of these individuals, the discharge itself.

Mr. Slough tells us that when he was called in, he was told by Mr. Bell that he was discharged, and that the reason for that discharge was incompetence and a bad attitude. What does Mr. Slough do? He immediately says, 'I think it is because of union activity.'

What does Mr. Bell say? He says, 'No, it isn't.' What else could he say?

Now, Slough then said that Bell is supposed to have said, 'I don't know anything about the letter.'

Bell denies that he said anything like that. Mr. Chalenski enlarged it this morning by saying to you that Bell is supposed to have said, 'I don't know anything about the letter written by you, Josephson, DeLaurentis and ---', and the other co-pilot and he names him. There is no testimony in this case, even by Slough, that Bell said any such thing as that. But that is what Counsel said to you, he said this morning, and that is not the fact.

Now, Ladies and Gentlemen, I suppose that

it would make some sense to you, let's assume that I have three stenographers working in my law office, and business falls off to the point where I have to discharge one of those three girls. Is there something wrong with my evaluating the work of the three girls, and choosing to let one of the three go because I think that she is less competent than the other two? Is that some violation of law? Is that a crime?

I don't suppose that you would answer me that it was. But when it was determined to cut down on the total of employees of ths company, wasn't it natural, wasn't it natural for Winston, the head of the company, and Bell, his chief pilot, to evaluate the co-pilots that they had to determine which were to be let go.

Now, Mr. Chalenski complains about the choice that they made. If they made three other people-- well, the choice to be discharged, Mr. Chalenski, would disagree with that, as well.

Now, what does Slough say, just as an illustration? Slough tells us that on a couple of occasions, they weren't able to reach him because he had to go to Rochester to see an eye doctor, and he had to see the eye doctor. Nobody objects to his seeing the eye doctor. What they objected to is his not

telling them that this is where he was going, and not telling them where he could be reached.

Now, of course, before the Grand Jury, the testimony was that he went to Rochester to see his dentist. But whether it was the dentist or whether it was an eye doctor, that is not the point whether he needed dental work, or whether he needed an eye examination. That is not the point. The point was that he wasn't available. He didn't tell them that he was not going to be available, and then relied upon their presumption that he would be.

Slough admits that he sent for a plane from Elmira to Binghamton, and that when the Binghamton plane got to Elmira he had too many passnegers to fit into it. The plane would only hold nine, and he had ten passengers. Well, I don't suppose that any employee would make any great hit with his employer making a mistake between nine and ten passengers, which wouldn't be of any great consequence, ordinarily, except that the plane that he knew was coming over would only hold nine people, and not ten. I would think that an employer could get a little annoyed by something like that. I would think that an employer would figure that certainly his employees could count up to ten, or should be able to.

He told us these things, himself. He told us that he was unavailable on occasion. He told us that he made complaints about counter duty, and Counsel says to you that this is a character assasination. If somebody is assasinating Slough's character, he is the guy who is doing it because he is the one who told us, himself, these things.

Now, those things were the basis of the evaluation. These were the basis of the decision to let Slough go. Josephson -- Slough, incidently, there was nothing wrong that I heard dur ng this trial about his radio communication. Mr. Chalenski said that there was some talk about his radio communication. I don't think that there was. I think that that applied to Mr. Josephson, and that was the subject of some testimony by Mr. Bell, and I think, also a Captain Reeve, during the course of his testimony, if I am not mistaken. Something that he did not measure up in radio communication, which is primarily the job of the co-pilot in the course of a flight, and that had to be carried on with some dispatch, and has to be done correctly, because the safety of the flight, even the safety of the passengers depend on it. So it isn't just a matter of not liking the way he parted his hair. It isn't exactly that. That he didn' get along with other pilots? Well, you

heard the testimo[illegible] that Josephson was a great one to trade off his assignment, but when it came to repaying the fellow who took one of his assignments, he wasn't so quick to do that. There was a certain amount of resentment on the part of the co-pilots, and there was, apparently, a dislike on the part of some of the captains toward Josephson.

Now, Josephson had been there a long time. There is no doubt about that, and he had been under some severe criticism over a long period of time by Ted Bell, and you remember Josephson, himself, told us in part of his direct examination, that about a month before this union business was ever mentioned, that Mr. Winston got a hold of him and told him that Bell was complaining about him, that Bell was not satisfied with his work, that he was on thin ice, a month before. He admits this. And yet, Mr. Chalenski says to you that Josephson was discharged for no other reason than he spoke up at the union meeting. Well, now, Ladies and Gentlemen that is just not so, and it is not so from Josephson's testimony, himself. This is not a claim made by Bell about him. He tells us this himself, and he tells us that he changed schedules of flights without authorization. He admits those things. Is this a character assasination, when he tells it himself?

Now, Mr. Baan, Baan testified that he was simply told that the company didn't need his services. He, apparently, understood he was only there a short period of time, and that there was no particular problem, and apart from the first count of the indictment, Baan was never mentioned further in the indictment, itself.

Now, Ladies and Gentlemen, were these three men in fact, discharged for union activities? You have to be convinced by the evidence before you, convinced beyond a reasonable doubt that that is so, and if you are not convinced that that is so, if you have remaining in your mind a doubt about it, it is your obligation to resolve that doubt in favor of the Defendants here; in favor of their innocence.

Now, when you consider this, and you consider it in a calm way, it seems difficult for me to see how you could ever be convinced that under all of the circumstances, these men, in fact, were fired because of union activities. Weren't they fired, as a matter of fact, by reason of the previous history, by reason of the economic requirement that they reduce their forces?

Now, let's discuss these meetings, and I am talking now about the meetings of the Captains and co-pilots that took place on October the 5th, I

believe the date was, at the company office. Now, the Captains' meeting, as I understand it, was first and that was followed by the co-pilots' meeting.

Now, during the course of both of those meetings, Mr. Winston made somewhat extended remarks. I think that perhaps he spoke for an hour or an hour and fifteen minutes or an hour and a half, and then there was followed some short remarks by Bell at both of these meetings.

Now, the testimony of Mr. Winston is that the first meeting that he spoke at, the Captains' meeting, which was the first in order, that he gave substantially, if not identically, the same talk to the captains that he later gave to the co-pilots and a portion of that talk was reading from a prepared script that he had in his possession, and fortunately for us, still has, and that he read to you as part of his testimony here, yesterday or the day before.

Now, Bell tells us that he said the identical thing at both meetings, his remarks were very short. Now, fortunately for us, and unknown to us, completely unknown to us was the fact that a tape recording was made of one of those meetings, and that was the second meeting, the co-pilots meeting, and you will remember that Mr. Josephson, Mr. Williams told us,

that the morning of that meeting, that they went out, and purchased some where in Binghamton a brand new tape, and they were going to record th remarks that were made at that co-pilots' meeting, and that Williams armed with his pocket recorder, took it in under an overcoat or something, and set it up in some fashion so that it would record whatever was said at that meeting, and that those remarks were recorded on brand new tape, that is supposed to be, but is not, the tape that we have in evidence in this case.

Now, first of all, when they went out, and purchased this tape, when they went out or when it was arranged to bring in this pocket recorder in this sureptitious fashion, what was the purpose of that? What really was it to do, do you suppose? And when you think about that, you might trace the history of what happened to the tape,after it was made. It was turned over by Williams, after he took it out of his machine, it was turned over by him to Josephson, a week later, or thereabouts, and it was turned over by Josephson to Mr. Calder, and retained by Calder down in New York City for a year and a half until it was finally turned over to the Government in conjuction with the prosecution of this criminal case.

Now, it is not the same tape, and there

hasn't been any contradiction of the testimony of Mr. Fish, who was called here last Friday, and who told you that that recording device of Williams' was a -- I have got to find my notes on this -- a monophonic recorder, and that it plays a monophonic recording on a tape.

Now, this tape, from an examination by Mr. Fish, and he is connected with one of the largest concerns in this area of the country, he is their engineer in charge of this type of thing, and examination of this exhibit indicates that, number one, this is a stereo tape, and, number two, what is on the tape is the product of a stereo recorder, which was not what Williams had.

Now, you might say, well, you are not arguing that what appears on the tape is incorrect, and therefore, why the issue about it?

Well, number one, we thought it might be of some significance for you to know what the truth of it was, and to know that this exhibit is not what it is represented to be.

And number two, and by far more important to us is the fact that the tape that we have here, and the tape that you heard is not a complete tape.

Now, what is missing from it? What is

missing from it? I timed the period of time that it took Mr. Winston to pick up from the point where the tape stops and to read to us what he read at that meeting, to complete fully what he said, and it was over ten minutes. So that there is ten minutes of Winston's talk not on this tape. And then we have the early part of what Mr. Bell said that is not on the tape, and you know, that doesn't jell with Williams' testimony. Williams wanted us to understand that when Mr. Winston got through with his remarks, he had a chance to sneak over to where he had planted this microphone, and to switch the recording device over to the other side and then, that there was a lull between Winston's remarks and Bell's remarks, and he made the switch, and now Bell's remarks should be recorded.

Well, if he did it the way he said he did it, we would have all of Bell's remarks, instead of only part of it. And we don't have it. So I suspect that he didn't do it just as he said he did.

Now, what do we have on this tape? We have got extensive remarks by Winston where he is presenting his case, as he had a right to do, against the union. His remarks were delivered, and it is fortunate, that you were able to hear them so that you could hear the tone of voice, the inflection, the manner

in which they were delivered. It was a calm, temperate logical discussion of what he had to say. It was not demanding, it was not insisting, it was not coercive, it was not designed to over come somebody's freedom of choice. That is the test. It was not that type of talk at all. You heard it.

Now, the rest of it, was not on here that you heard from Mr. Winston, and it is just remarkable, number one, that at the point that that tape stops, it is remarkable that he was reading from something. It is remarkable that he still had the text of what he read, so that we were able to supplement that.

But not so with Bell; not so with Bell. So far as Bell is concerned, all he can do is tell us from his memory what the remarks were that he made before this tape picks him up. Now, if it had been turned, as Williams tells us, with all of the authority that he could command, in advance of Bell's speech, all of Bell's talk would be on it, and we would have no problem there.

Now, nobody says, as the indictment charges, nobody says that at the co-pilots' meeting Bell said in words or in substance: if the union gets in you are going to have tough check rides. Nobody claims he said that at that co-pilots' meeting, and what you hear of

what he said on the tape, it is not there.

So I guess that we can assume that he didn't say it then, at the co-pilots' meeting.

Now, then, we come to a consideration of the captains' meeting. The captains' meeting, of course, is the first meeting. Now, Bell tells us that he said the same thing at both meetings, and what he did say was fairly inaccurate. The only thing that it was noted for was his obvious lack of enthusiam about a Hoffa-dominated union, and I suppose we are all entitled to our opinions on that subject one way or the other, whatever they may be, and I am not going to impress you with mine.

But he did say that he considered this to be a vote for Hoffa, or for him, and he asked for their support.

But now, the important thing is the captains' meeting. We had in all, I think , six captains testify, and one of those captains, Captain Briggs quoted Bell as saying -- now, of course, this is not on the tape --, and other captains who heard the tape said that Bell said the same thing as they listened to on the taping of the co-pilots' meeting, but Briggs said or quotes Bell as saying, 'In the past we have overlooked bad days on check rides. In the

future we will take a closer look.'

That is the threat that they wanted to get in.

Six other captains testified: Lamos. Lamos quotes Bell as saying, 'Flying procedures have been allowed to slide. They will be tightened.'

Well, that is pretty inaccurate.

Kleitz: Kleitz quotes Bell, 'We have had a good relationship. At times things were bad. There were bad days but we won't have any more bad days.'

Now, I don't think that any of us would want to convict a man on that.

Solberg: 'I realize some of you have had bad days and didn't feel up to it. If the union gets in it won't be tolerated.'

Captain Pusztai, Reeve and Herrington said there was nothing like that said, nothing said by Bell about check rides.

Now, when you consider this tape, that is where we are damaged. When they elimated from the tape all of what Bell said because if we had all of what he said, you would know for sure that he made no such threat as some of these people have said.

Now, this situation is a little bit, a little bit on the order of Hummell's notebook. When

Hummell took the witness stand here to tell us about a meeting on October the 19th of 1974, which was part of a flight school instruction, he told us how he took notes of it in his notebook, and that he had those notes, and using those notes to refresh himself, he is able now to tell us the conversation, and when we take a look at the notebook, we find the pages that that is written on are collectively different from the notebook. So when he tells us another notebook he has on the witness stand with him, they came out of that one, and when we look at that we find that that is not the same type of paper, or even the same color of paper.

But never, in submitting that to you, if we hadn't caught it, never in submitting that to you did they explain this, if it were in fact an innocent removal of some pages, and pasting in of other pages.

If that is what it was, why didn't they tell us that in the first place. Are they testing our detective abilities to find it in the course of an examination of the witness? Fortunately, we did. I am suspicious, frankly, of it. The same as I am suspicious, frankly, of that tape, and for the same reasons.

Now, let's go on a little further here. Remember, now, that the ballots on this representation

were counted, that issue was decided by November 25th of 1974. The material says, as I told you, it was certified on December 4th, or December 5th. The election is over with. The certification is completed. The Teamsters are the representative union for the employees of Commuter. It is all done. It is all completed.

Now, then, we are concerned, or our attention is brought to something that happens after those events. First of all, the discharge of Mr. Sholl. Well, now, Mr. Sholl, you will remember was discharged as a result of this door on the airplane business that you have heard considerable about during the course of the trial. Mr. Bell had nothing to do with the discharge of Sholl. He wasn't present when it happened. He wasn't present when the door fell. He took no part in the determination that Sholl was to be discharged and the fact was that Sholl was discharged because of that damage to the aircraft.

Now, Mr. Chalenski says, with reference to that, 'Well, that is not going to hold water. Other people damaged aircraft, and they weren't fired. Sholl was only fired because he was in a union.'

Well, I don't know now anybody, number one, was supposed to know about Sholl's union activities,

I suppose that there is a difference in the attitude of any employee. He doesn't fire everyone who does a similar thing. I suppose that it might, to some extent, depend upon the circumstances under which it happened and, of course, damage to an airplane is not a minor thing that you can erase by reversing your pencil, and by just scratching something off. The amount of money involved in the repair of an airplane is pretty substantial, and what happens as far as Slough was concerned resulted in a substantial expenditure of money

Lamos: Discharged December 13th. Now, we are talking about a two month period, remember, after the discharge of Slough, Josephson and Baan, we are two months beyond that now and Mr. Lamos, again, was discharged for a particular reason and it involved what Mr. Chalenski loves to call being required to take a check flight or make a check test of an airplane during a fifteen-minute rest period. Lamos wouldn't have tested that plane if it happened on his day off. That fifteen minutes didn't have very much to do with that. Why didn't he say he didn't want to do it? I have never been convinced that Lamos was discharged. I always thought that he quit, from what I heard of the testimony in this case. But in any event, Bell had nothing to do

with it. Bell wasn't on the premises, and the only people that were there, was Winston, his wife, and a lady, Mrs. Persons who came in and gave her version of what happened. And I don't think that any of you could count very much as a reason why he was discharged, if that is what that amounted to. But certainly Bell had nothing to do with that transaction.

So now we get to Williams. Williams, now in January of 1975, and Mr. Chalenski doesn't seem to like the agreement where Williams acted as the spokesman for the co-pilots back in October of 1973. Now, as a result of Williams' efforts in that regard, the company agreed to three stages of salary increase for co-pilots, with the understanding that within that three-year period co-pilots would qualify as captains, either for Commuter, or for some other company. If there was not an opening at Commuter, they would go on and do captains work with another aviation company.

Now, that was something that Williams arranged for on behalf of the co-pilots. Now, comes the time in 1974 when it is suggested that he ought to get his A.T.R. rating. He takes a leave of absence, originally for two or three weeks, and goes to Florida, takes the course, is unable to pass it sucessfully and takes it over again twice or three times, and I am not

sure how many times,but in any event, when the course is completed, he hasn't passed it.

So that in compliance with the rule that he negotiated, he would normally be on it. What does Mr. Chalenski say about it? He tells us that all Williams got was a big run around from Bell. You remember, Williams told us that when he came back from Florida, he wanted to get his A.T.R. rating that he could get in Rochester, and that he needed some more flying experience to get it. He asked Bell if Bell would help him get it and Bell told him he would. And then, Williams indicated that he would like to get the same type of an airplane that he had used for his training in Florida. Commuter didn't have one, but there was a customer of Commuter that had one, a resident of the Binghamton area, and Bell went to the owner of that airplane to see if it could be made available to Williams for him to complete his training.

The owner, who knew Williams, and knew Williams' family said, 'Well, I want Williams to come and talk to me about it.' And Bell went back to Williams and told him that, and Williams never bothered to go to see this fellow about getting the plane available. And Mr. Chalenski says to you that all Williams got from Bell was a grand run around. Those

were his words this morning. What more could Bell have done? Go out and buy an airplane, himself, to give Williams the lessons that he needed?

Wasn't it pretty clear, wasn't it pretty clear from the evidence here that Williams was a candidate for dismissal under all of the circumstances here, union activity or no? Just a normal course of events, I think that you would have to agree with me.

Now, so far as Larimore and Hummell are concerned, their discharges in February of 1975, three months now after the representation is completed, the votes have been counted and the Teamsters are in, and these three pilots and these men are discharged because they are cutting back on the staff, and Bell had nothing to do with that determination, other than to review with Winston the possible people who could be discharged.

Mr. Winston has told you frankly and honestly that that was his determination and that when Bell called him in, that Bell was following his instructions.

Now, Ladies and Gentlemen, what you are being asked to say is this: that the company cannot reduce, cannot cut back on their employees no matter what economic set backs they have had, no matter what

contracts they have lost, they cannot discharge employees simply because there is a union involved. That is what they are asking you to say by your verdict here, and to say that would be against all logic, all reason, and it would be against all common sense.

Now, they are not only asking you to say that by your verdict, they are asking you to say in addition to that, that these Defendants are guilty of a crime, and I say to you: it would not be just or right for you to convict these Defendants in this case.

Now, let's consider Bell, Ted Bell for a minute. He is a man forty-two years of age, married, two teenagers at home and he has been working for Broome County Aviation since 1959, a total of seventeen years. He started as a flight instructor, a charter pilot in 1962 and was made co-pilot.

Bell is proud, certainly, of his contribution to the success of this company. He has worked long and hard. He flies every day. He has got something like sixteen thousand flying hours to his credit. He is working for a salary, he has no financial interest in this company, never had a financial interest in it. He is working as an employee, the same as these other people are working, but he, by virtue of his position, is closer to the management than they are. But

essentially there is no other difference between Bell and them. He flies with them in good days, and bad days, and other kinds of days. He is a line pilot, flying every day in the week. So I ask you people to take a good, long, hard look at the evidence. Be sure that you are satisfied beyond a reasonable doubt that he is guilty, before you say so by your verdict.

Thank you for your attention.

THE COURT: We will take our luncheon recess, and we will continue on our chosen schedule here of half an hour.

(Whereupon, the Jury was excused.)

THE CLERK: Court stands in recess for one half hour.

(Whereupon, the proceedings were recessed at 1:10 p.m. until 1:40 p.m., at which time the following took place before the Court and the Jury.)

AFTERNOON SESSION

THE COURT: Good afternoon. Mr. Richards.

MR. RICHARDS: May it please the Court, and also, I would like to repeat what Mr. Shanahan said to you: it has been a long and difficult trial, and you have been very attentive and I realize the fact that it is complicated, and I would like to thank you, both on behalf of myself and my client.

Also, in the course of discussing the evidence with you, I will refer to certain testimony that has been given by the witnesses. I may have gotten it confused in my notes, or my recollection, and it may be mistaken. I would ask you to rely upon your own recollection and not in any way try to omit evidence or distort it in any way whatsoever.

I won't go into the principles of law, which the Court will give you.

Mr. Shanahan touched upon them. I would like to keep these principles in mind, during the time that I am talking with you.

I would also like to tell you that neither Mr. Shanahan nor myself have another opportunity to respond to any comments by Mr. Chalenski, and I would ask that you keep our arguments in mind at the time that he closes out his final remarks to you.

I think it very important, concerning the indictment to give you its historical backdrop. You heard Mr. Winston discuss the growth of his company, because we are not dealing with an Eastern Airline or an American Airline, with hostesses and counter personnel and things like that. As Mr. Winston indicated: back in 1964, there were only two or three pilots operating a charter service, and that throughout the years the business had developed, until, at this point, he is operating scheduled runs with a Commuter Airline, still maintaining a charter service as well.

So you can see that it is the type of business that has grown throughout the years, and I think it must be quite apparent to you, as it was to me, that the growth of this business is solely resting upon the ability of Mr. Winston.

When we reached the year 1974, which is the critical year in this indictment, we find that Commuter, at this time, was employing something in the area of some twenty-five employees.

It was in late 1973, that Winston purchased his third and fourth Metro aircraft. You heard him say that these aircraft were costing him in the neighborhood of something like three-quarters of a million dollars, in addition to the other money necessary

to tool up the aircraft.

He completed his negotiations and anticipated and expected delivery of these aircraft in July or August of 1974. And as he explains to you, it is not simply buying an airplane and having it delivered, and then proceed to fly it, but it is necessary to train staff and personnel, pilots to handle that aircraft, and he told you, further, that in the Spring of 1974, sometime around April or perhaps earlier, he began to train pilots and co-pilots to staff these Metro aircraft, and that this training program and hiring policy on the part of the company continued up until the first part of September, 1974.

He indicated why he bought those Metro aircraft. It was his intention to take one Metro aircraft, and convert it into an executive style aircraft to service his charter business, to service I.B.M., to service public loan, to service the construction companies who were doing charter business with Commuter.

The other Metro he was intending to expand his routes, and as I indicated to you, the expanding of a route really meant he would have to experiment with the route, and after a while it would take hold, and finally it would become a money-making

proposition.

After these aircrafts were delivered in the late summer of 1974, the economy continued to sag. It did not look good, and as a business judgement on his part, he decided at this point that he no longer could implement those policies that he had previously considered.

He learned at about this time, that I.B.M. was going to go pure jet. He did not own a pure jet, and as a consequence, there would be a cut off in that line of business. He further learned that Public Loan was going to share an aircraft with a firm in Scranton, Pennsylvania, and to him that meant more loss of business.

Also, the construction business was off, as most of us know, and that these firms were not utilizing the charter business. All of these factors, Ladies and Gentlemen, were going through the mind of Jerry Winston at the time that he decided to cut back on his operation.

Now, Mr. Chalenski would apparently substitute his own judgement for that of Winston. He is suggesting to you that these were not factors in cutting back on the operation of Commuter. He is suggesting to you that this was wrong judgement on the

part of Mr. Winston, that indeed, these facts did not exist, but I submit to you; have you seen any evidence to the contrary? Has anyone refuted to you that the I.B.M. contract was lost? Has anyone demonstrated to you that the Public Loan contract was lost, or that the construction business, the charter business which was being used, had cut back?

Certainly no one can argue the state of the economy at that time, and furthermore, there is a reference to these financial statements which were submitted at the request of the Court. They were certified financial statements to demonstrate the economic position of Commuter throughout these three critical years: 1973, 1974, and 1975.

And what do these financial statements show? Operating income before taxes, the year 1973, $236,000.00.

Then operating income, before taxes, the year 1974, $318,000.00. 1975, $109, 690.00.

In effect, the operating income of this corporation was reduced by almost two-thirds in 1975, because of the fall off in the business in 1974.

Now, I don't think, in this indictment, in fact, I do not believe in this indictment that Mr. Calder or the Teamsters should be substituting

their judgement for the judgement of Mr. Winston as to whether or not he should cut back on his operation. This is strictly a business decision, and I would hope in your deliberations that the Defendants in this case will not be put on trial for business decisions concerning Commuter Airlines.

Now, Winston indicated that by September 20th, 1974 he had to make a decision, this decision to cut back and which, as a matter of course, would mean a reduction in his staffing, pilot staffing for the aircraft.

Now, September 20th. What is so magic about that date? As he explained to you, this is the date, the deadline for the official Airline Guide. This is the manual in which all airline commuters, certified airlines together could use the various routes that they have throughout the country. If he fails to make that deadline, he will not have a listing in that manual.

So, as a consequence, on September 20th, 1974, he had made up his mind that there would be a cut back in his operation. Now, contrary to what was suggested earlier this morning, the decision on September 20th,was not an identification of those co-pilots who would be reduced, but rather it was a decision

that the business would be cut back. He realized he had to effectively ground his Metro in the fact that he would not be utilizing those two Metros in the same manner as he previously had.

He then indicated that he had a session with Bell at the end of September to evaluate the various pilots and co-pilots to determine which co-pilots would be discharged.

Now, it was his intent, as he testified, to reduce his number of co-pilots down to the number of seven. As he indicated, he wasn't, at the moment, except for perhaps Baan, whom he decided, because of the training, would be discharged, but he was primarily concerned with reducing the number of co-pilots.

What kind of session did we have at this point? This was not a session whereby they indicated, 'Well, because Slough, for example, was not available on a particular date, that he should be discharged, or because Josephson, failed to or refused to make a flight with Solberg, that he should be discharged; this was not that type of session. This was literally an evaluation session. We have so many co-pilots and we must reduce the number down to seven. And now, let's evaluate the proficiency and the quality of these co-pilots to determine which ones will go, and this was

the type of session which he had with Bell at that moment, and it was decided, at this time, and decided long before, or a few days before this October 2nd or October 3rd meeting of the Teamsters, that Slough, and Josephson, co-pilots, would be discharged, and Baan, because of the limited time he had been with the company, he, too, would be discharged.

Now, that decision, Ladies and Gentlemen, was made at the end of September, some two or three days prior to the time that the Teamsters ever met. Two or three days before it became common knowledge that the Teamsters were even on the scene.

Once that decision was made, then it was just a question of implementing. The only reason the indictment is here today is because, and unfortunately for the Defendants, the Teamsters decided to have an organizational meeting the second or third of October, and it was because of that meeting that the Government is suggesting to you that these three men, Slough, Josephson and Baan, were discharged, and I submit to you that the facts do not sustain this contention.

Mr. Shanahan has touched on it, and I would just like to reiterate these points because I think that they are critical, and I think that they are very important.

Number one, as I gather from their arguments, they are saying: Look, these three fellows were at the meeting the night before. They had varying roles of activity at this meeting. Slough, apparently had arranged the meeting, and Josephson, if I recall, he indicated that he had no contact previously, but he met Calder the first time, and apparently he had a conversation with Calder that night.

Baan apparently asked several questions during the course of the meeting. Now, they are saying because of the extent of this activity, they were discharged. Well, there are several things wrong with this and the most important one, of course, is that for Bell to implement the decision, to discharge these pilots, it was absolutely necessary, as he testified and you heard no proof to the contrary, to set up those flight schedules by five p.m. on October 2, 1974, some three hours before the meeting commenced, some three hours before Slough was identified as an organizer, and some three hours before Josephson was seen allegedly talking with Mr. Calder, and some three hours before Baan was asking some questions on the floor of this session.

Now, I submit to you that when this decision was made, management had no knowledge as to

the extent of activity on the part of these three pilots.

But then, to build their foundation somehow, and we believe that for the Government to sustain their case, there are three basic points that they must show: one is that the particular employee was discharged, was involved in union activity; two, that the Defendants knew they were involved in union activity; and three, because of their activity, they were discharged.

I submit to you that as far as knowledge of the Defendants of the union activity of these three pilots, there is absolutely none. A real effort is made on the part of the Government to say: well, we know how you learned about these three men, there was John Herrington there. Of course, he wasn't invited, but he came to the meeting anyway, and John Herrington heard these three names mentioned. John Herrington also heard Baan ask questions, and saw Josephson standing with Calder at the door and talking. Undoubtedly if John Herrington was there, he saw many pilots talking with Calder that night. But for some reason just Baan and Slough were going to be singled out.

Herrington, of course, denies it. He denies that he reported back to the management that these are the three most active, allegedly. The

Government, realizing the weakness of their position, realizing that they are trying to pile one inference upon another to connect the Defendants with the discharge of these three pilots, go on and say, 'Well, all right, not only that, but we have got the Josephson matter. Josephson claims that he was on a flight, in the morning with Herrington, and he continued to talk about the meeting last night.' Well, I echo the words of Mr. Chalenski: what is the point of echoing the words of last night if Herrington was there, and he knew what happened last night, and there is no point in it.

But even furthermore, the flight schedule, Ladies and Gentlemen, indicates that Josephson was not on a flight with Herrington. You will be able to take this into the Jury room with you as Defendant's Exhibit E, and you will notice here, October 3, 1974 Floto, Ira, and the Ira being Ira Josephson in the morning of October 3.

So there is no way that Josephson could have been talking with Herrington that morning. Apparently the Government realized the difficulty of that argument, and went on further and said: well, all right, maybe that isn't the case, but at least as far as Slough and Josephson, there was a letter written September 24th, and Slough had a conversation again

with Herrington, and lied to Herrington and indicated the four pilots were responsible for authoring that letter, which of course wasn't the truth.

Allegedly this was supposed to have been reported back to Bell. Now, Mr. Chalenski in his argument this morning stated some facts which are not -- which are not in my recollection, and that is that this was a little trap set up for Herrington, or for the Defendants, I might say, and when Slough came in for his termination conference with Bell, Bell said to Slough, or identified the four men who authored that letter. Ladies and Gentlemen, that was not my recollection of what Bell said. My recollection was that Bell said that he didn't know anything about the letter, and except that it was distributed, and had no knowledge of the author of this letter.

That is the only evidence bearing upon knowledge by the Defendants of the alleged union activity of these three pilots. I might add further that I will not support or buy Mr. Calder's argument that anyone who attends a meeting was an organizer, in his view. I submit and believe that the Court will charge you that there must be a showing of actual union activity on the part of these pilots who are discharged.

THE COURT: I will not so charge.

MR. RICHARDS: Now, in the course of the evaluation session, there are several factors considered as to why Slough should be terminated. Winston indicated probation, and I will touch upon those points which are -- which haven't been mentioned by Mr. Shanahan.

Number one, the company had a probationary policy. There has been testimony to the effect that the probationary policy is for the extent of one year. Slough was hired some time in May of 1974. He was, number one, a probationary pilot. Secondly, Winston considered the non-availability. He also considered the counter duties, the carelessness of it.

Each one of these factors, the poor judgement, the tenth passenger incident with Ted Bell, each one of these factors are not suggesting in and of itself as necessarily going to mean a discharge of a pilot. I think that you must take into account that there was a decision made to discharge, or to reduce the staffing, and they were merely evaluating or considering the various aspects of the pilots, and the qualifications, and which ones should go, and which ones should stay.

In Josephson's case, he actually had a very bright prospect for the company. Mr. Winston indicated that when he was first hired that he saw him

as a potential management person, he was bright, intelligent, and he had the necessary education. But things started going sour for Josephson. We had incidents of changing the duty roster; we had incidents of the Canada Air pilots, which Mr. Chalenski makes light of. As a matter of fact, when you consider the importance of this, this is an actual manual used by the pilot at the time that he was using airports in Canada and that manual must be kept up to date tc consider changes made at the airport, the runways, and extensions and that sort of tning.

Josephson, from his own lips, admitted that he was behind in regard to keeping up tnat manual. Josephson, from his own lips, admitted that things were going sour on him. He indicated, a month before his discharge, that Winston had spoken to him, had indicated to him he was on thin ice.

And finally, the incident, in my mind, which is probably the most important is what I would consider the Solberg incident. Now, this is one of the Government's witnesses, and as Mr. Chalenski said, he had verything to lose, and nothing to gain, but you heard him testify that Josephson was a co-pilot, with him on a flight to Newark, and that tnere were thunder-storms and showers, and conditions which are not

unusual for the pilots of Commuter Airlines. Also that when they were on the ground and Solberg made a decision, as a captain of that ship, to take off, Josephson refused.

Now, Ladies and Gentlemen, in this type of operation, that becomes very critical, and I am sure that that played an important role in the mind of Winston when he considered discharging Josephson.

Finally, in the Baan case, this is a man who was with him for only two or three weeks. His training, he obviously was brought in and it was testified to, he was trained to manage one of the Metro aircraft. They decided to effectively ground the Metro aircraft, and there was no need for the number of pilots that they had available. So as a consequence, Baan was being discharged at that point.

Now, except for the few questions that Baan may have asked at that session, there doesn't seem to be any further testimony or suggestion that he was involved in any way with the Teamsters' activity.

Then on October 3, because, as Mr. Winston testified, because of that September 24th letter that was put in all of the mailboxes of the pilots, he decided to hold a meeting of the captains and co-pilots. Now, we are fortunate to have a tape of that meeting because we do know, at least what is

on the tape, what was said at that meeting.

I want, at this point to have you remember, as indicated to you by Mr. Shanahan, that the employer has a right to persuade, and to advance his position in this election, and when you review what was said at this meeting, when you review the statement which Mr. Winston made at that meeting, keep in mind it was one party to a two-party election, persuading or advocating his position.

Now, as I heard the tape, and as I read the transcript, it appeared to me to be a reasonable presentation, and it appeared to me that here was a man proud of his business, who had built it up from nothing, and who was concerned about the future, and who spent some time working with banks about money to buy aircraft and who is always looking for new aircraft to expand, and he was proud of it. He was also proud of the benefits offered by his company, and he dwelled upon that to a considerable degree in his statement to the pilots.

Let me just refer to several things which Mr. Winston said at this session. 'As we grew, they grew. We gave them these raises because we can afford it. It is not because we are forced to do this. Now, some of you have been around long enough to know

that even when there is inflation, that we voluntarily treated the co-pilots and the captains alike. Office girls, everybody in giving you two inflationary raises. That is, raises to off set the inflation. Now, we hope to continue to do this as this crazy economy continues. But you know, we are pressured too. Don't think that it is just the union. The oil companies have gone up more than one hundred percent on their price. We ordered glychol here for our de-icing, and that's gone up over one hundred percent over last year. Everything we touch is that way. We can't become unbalanced with our economics.'

Now, does that sound like a threat, or does that sound like persuasion? That sounds like someone advocating their position, and let there be no question in your mind, I am sure that Mr. Winston, and he told you from the stand, that he was against the union, and no one raises any question about that whatsoever. But he had the right to state his position at that meeting. He had the right to describe the growth of the business, the problems that he had, and where he thought that the business was going.

Now, unfortunately, the tape does not help us as to the balance of Mr. Winston's statements, but we are fortunate enough to have the statement which

all witnesses agree was right at the time of the meeting. The statement, and I would like to read you only part of that, 'why shouldn't you join a union and pay your money in dues, and possible assessments, initiation fees and fines? Union or no union, this company has and will always pay competitive and fair wages and benefits.'

Is that a threat? Does that, in any way, interfere with or influence or coerce these pilots in the designation of their representative?

Or what about this statement: 'The union agent probably told you that with a union, you will get everything you now have, plus more. Is this true? If the union is successful in gaining control over you, the company would not suddenly change its way of doing business. We are trying to be fair in the past, and we will continue to be fair in the future.'

And finally, and you will have the opportunity to review the entire statement and I have only selected a few of them, 'Do you have to attend union meetings? Answer: You don't have to go to union meetings if you don't want to but you may find the union making decisions for you in your absence which may not necessarily be in your best interest.'

Now, is that trying to dissuade these

pilots from attending union meetings, from trying to find out what is going on? From evaluating the position of the company, with the position of the union? Or is that trying to be helpful to employees over which he had concern?

Unfortunately, there was an earlier meeting, and we don't have a tape, but it almost without exception, the witnesses indicated that what was said, at the captains' meeting was substantially the same as what was said at the co-pilots' meeting.

And is it unreasonable to assume, because afterall, both of these meetings were scheduled, that what was said at the co-pilots' meeting was going to be generally the same thing said at the captains' meeting.

Now, if my recollection serves me, Lamos said that the Captains' meeting was almost identical with the co-pilots' meeting. Reeve, Herrington both said the same thing and, of course, both Bell and Winston indicated that what they said at the captains' meeting was the same thing as at the co-pilots' meeting. And also Briggs, and neither one of the Government witnesses indicated that what was said at the captains' meeting was the same as what he had heard on the tape or statement of the co-pilots' meeting. It is, frankly, unfortunate that we don't have a tape of that meeting

so that once and for all we would know, but in my opinion, and I think that the evidence was very convincing, and it is very reasonable to assume that the comments made at the captains' meeting was substantially the same as those that were made at the co-pilots' meeting.

There was only one other meeting which the Government introduced any evidence of alleged violation of this statute, and that was the meeting of October 19th. Now, the Government earlier had introduced an Exhibit indicating a notice of a meeting of November 2nd, 1974. There was, of course, no evidence, or testimony regarding this meeting, and I am presuming that there is no indication that anything wrong was said at that meeting.

In any event, Winston told you at the October 19th meeting that he first started discussing the Reader's Digest article. He indicated to you that this article had been given to him by Solberg, who was one of the witnesses who testified here. And Solberg indicated this to be the case, that he voluntarily brought in a Reader's Digest article to Mr. Winston having to do with the Teamsters and the pension plan, and brought it to his attention. Winston indicated that at that October 19th meeting, he proceeded to read

this article.

He then went on, and again, as he did in both other meetings, told the virtues or the benefits of the company. He talked about Hank Excell, he talked about his retirement, which was anticipated at the first of the year, he talked about the death of a Burt Melstrom, one of the employees of the company, and how the company paid the benefits. Finally he got to the heart of his talk and namely the Golden West contract, and there we must refer back to the notes , and if you recall, that when we got to the Golden West contract, in his notes, there was the figure of $18,000,000.00. And if you recall , Winston indicated, and, I believe, I believe that there were other witnesses indicated this to be the case, particularly Hummell, and it was that Winston described that five companies on the west coast had merged, and subsequently they were organized by the Teamsters, and because of the contract, which this merged company entered into, and he testified that he had a copy of that contract, that the company lost $18,000,000.00 , and Winston indicated in no way would he sign a contract like that. Indeed, if he ever had to sign a contract like that, he would pull in his horns he would cut the less productive routes, he would retire padlock the doors, and there is no question about that.

But all of this, Ladies and Gentlemen, related to and was concerned with the fact that he was forced to or had to sign a contract similar to that one of Golden West.

Now, we got some confirmation of this. This was only one witness and that was Hummell, who attempted to say: no, Winston didn't relate it to the contract, but rather Winston said, 'If the union was voted in', he would do these things.

But Hummell, in his own testimony was inconsistent because, if you recall, he quoted Winston as saying that this contract was an economic -- this contract of Golden West was an economic disaster. And before he, meaning Winston, would sign it, he would close down the company.

Now, this is the testimony of Hummell. This is not the testimony of Winston, who incidently did, or in his testimony, confirmed that this is what he said. And I submit to you that despite what Hummell's testimony was, concerning the union voted in, that he was inconsistent, and that he knew this contract was being considered by Winston, and he knew that the so-called options were related to the signing of the contract.

Now, if you recall it was Hummell

notebook that provided the key, allegedly to the Government's case, and if you notice further it was that notebook that had to be doctored, and that there were sheets torn out, and Hummell was unable to say what was written on those sheets, and only when he was pushed into a corner did he admit that he could not tell where those sheets of paper had come from, from what notebook. All of which, in my judgement, was highly suspicious. If he wanted to level with you, the Jury, why didn't he simply say the notebook to which he referred had pages attached to it which were notes taken at the time of this meeting, and there would have been notning further said regarding that.

In addition to that, Hummell indicated that he wrote down only what he considered to be important. And I would suggest, at this point, in the campaign, upon briefing by Calder and Company, he knew what was important, and he would have those notes reflect what he thought would eventually get Winston in trouble.

Now, Hummell further indicated that there were two other pilots that he remember who were at -- three other pilots who were at that meeting. There was Ton, and you didn't hear Ton testify as to what was being said at that meeting. There was MacDougald, and you heard him testify that it all related to that

Golden West contract, the so-called options, and finally there was Larimore, which Hummell identified as being at that October 19th meeting, nor did we hear any testimony from Larimore that Winston said these things at that meeting.

And I submit,Ladies and Gentlemen, as far as that October 19th meeting goes, that it was again the company giving its position in this election. The company trying to sell the pilots to vote for them and not vote for the union.

We now move to the question of the ballot, and it is the Government's case, in the first count of the indictment, that there were certain threats of reprisal on the part of the Defendants, one of which was what they described as the solicitation of the ballots by Winston. My notes reveal that there were some thirteen pilots who testified regarding this Bell incident. I noticed that Herrington, Pusztai, MacDougald, Reeve, Lamos, Hummell and Larimore, all testified that Winston did not ask for their ballot. Lamos indicated that when he came in he said, 'This is a personal matter and only my business,' and nothing further was said.

Mr. Winston did not ask for his ballot. Lamos came in and gave his opinion, and his privacy was respected, and that was the end of the conversation.

Nor did Lamos in any way disagree or say that Winston attempted , from that point on, to persuade him to give over or turn over his ballot.

Larimore: He said, when he came in, 'Look, I have gotten my ballot and I mailed my ballot in.'

What did Mr. Winston say to him? 'I won't ask you how you voted,' and that was the close of that conversation.

Now, again, as pointed out to you in the manner in which the ballots were made out, it is the position that we take in this law suit that Mr. Winston did have the right to discuss with these pilots, to talk with them concerning their ballots. They did not have a right to violate the statute by interferring or influencing or coercing them in the designation of their representative.

Now, I think that this ballot bit really falls, it seems to me, in a setting, and I will explain to you what I mean by that: you will recall that after the election, when the ballots were counted on November 25th, that the Teamsters had received sixteen ballots: that there were four ballots that were not cast; and that there was one ballot for the company.

Now, Winston knew this because he was

present at that time. Now, thereafter, after November 25th, and for the week later, several pilots came in to tell Winston that they had not voted for the union. Now, remember, Winston did not ask these pilots to come in: they came in voluntarily. Now, when the first, second, third or fourth pilot had come in with the ballot, and indicated that they had not cast it for the union, that would be consistent with the election, and there would be no problem, nor would it put Winston on notice.

But when the fifth pilot came in, that would indicate to him that more than four pilots had not submitted their ballot, and it was at this point, as he so testified, that he contacted his Washington Lawyers concerning this turn of events. And it was at this point that he proceeded to follow their suggestion as to what steps he should take, and as he indicated to you, he was requested to collect these duplicate ballots, and to file them with his attorneys for purposes of being sent to the National Mediation Board.

Now, this correspondence, this affidavit is all in evidence, it is all part of the Government's case, and you will have the opportunity to look at it.

But this was not action on his part to in any way interfere, influence or coerce these employees in selecting a representative. He was actually on notice

that there was and/or he thought he was on notice that there was an irregularity in the election, and he was bringing it to the attention of his attorneys.

Now, it was the same -- well, the pilots came in after the election to give over their ballots to Winston, and they were Ton, Pusztai, that is what my notes show, and Herrington, Excell, Solberg, Kleitz and Floto.

Now, of these three pilots, Ton, Solberg and Kleitz, were the only ones that indicated, from their testimony thatWinston solicited and forced them to give over their ballots.

Now, I submit the so-called set up to which I referred happened at a union meeting, before this time, in late October or early November, when it was first learned that some of the pilots, who were loyal to the company, who wanted to indicate to the company that they supported the company, had very willingly gone over and gone into Mr. Winston and turned over their ballots.

When Calder and Company realized this, there was discussion that pilots should very willingly go in and give Winston their ballots. He had nothing to lose by this strategy. For example, he knew their requests for duplicate ballots could be obtained later

on, and that the ballot could be cast for the union in any event.

And they knew, further, or they felt that in the event this conversation between Winston and the pilots concerning the ballot could eventually get Winston into trouble with the National Mediation Board.

So I suggest to you that it was discussed in the union meetings that Winston should be set up, and that these pilots should voluntarily go in and give over their ballots to Winston.

Now, there is some indication of that from the record. Government's Exhibit eleven consists of all of the requests for duplicate ballots. These requests are all dated between November 3rd and November 7th, 1974.

Now, this campaign, this election was going on since about the first of, or the second week of October and yet, all of these requests for ballots were signed on or about the same time.

Now, furthermore, the Government would have you believe that this election is strictly a one-way street, that the union had the right to encourage support for its position, had the right to have the pilots sign authorization cards, had the right to distribute requests for ballots, had the right to have

the pilots sign their authorization cards in the presence of each other. We have heard testimony of MacDougald as to the pressure that he was put under by the other pilots, and he cannot show that much interest or support for the union. But by the same token the employer was under a 'hands-off' policy. The employer had no right to advocate its position. The employer should stay out of it completely.

This employer could not get across its views, or its position to these employees.

It is sort of like a boxing match, with one fighter with his arms tied behind his back.

Now, it is my opinion that the statute never contemplated this. Now, after December 1, 1974, there were several discharges of employees, and it is ther Government's contention that these men were fired because of their union activity, and I would like to consider each one of these.

I would say, further, that the evidence must demonstrate that: one, the employee was involved in union activity. Two, that the Defendant knew he was involved in union activity and three, he was discharged because of that activity.

Now, the first one that comes up chronologically, I believe, was Sholl. This was the

so-called Metro door incident.

Now, was he active in the union? I have heard no testimony as to the extent of activity of Sholl in this union. I did hear some testimony that he was seen by Herrington to be talking to Calder at one point in some meeting. But apart from that, I heard no others. I don't think it unlikely to conclude at the numerous meetings being held, at the meetings that Calder was seen speaking to the pilots, but did the Defendants know of this, if you wish to describe it, this union activity? I have seen no evidence whatsoever, apart from the fact, of course, that Herrington saw him talking with him, that the Defendants knew he was in any way involved in the union activity.

He was discharged, according to Mr. Winston, for the reasons which he more than adequately sets forth in Defendant's Exhibit O. You will have an opportunity to take this into the Jury room with you, and I would ask you to read this exhibit very closely. I won't take time now to read it except to refer to the three reasons that he stated in this report as to why Sholl was discharged.

One, he was negligent in door opening procedures which resulted in the door free-falling, and severely damaged the door frame as to this aircraft.

Two, exercised his duties as co-pilot in a dangerous manner when he did not report to Mr. Warner, or to Mr. Maize that the door had free fallen.

Three, he was incompetent not to realize the possibility of a severe and dangerous damage to the aircraft after such a forceful and violent impact created by the falling of the door.

Now, all of the pilots testified that their ground school training for the Metro requires co-pilots, when they are opening this door, to keep their hands on the guard chain. They did this in order that they could monitor the way that the door went down. In the event that the snubber system failed, the door, by holding the chain, it would prevent the door from free-falling. The testimony is consistent about this.

Sholl indicates that he did have his hand on the chain, but after the door opened fr.m ten to twelve inches, that he realized the snubber system had failed, and he let go of the chain to prevent being propelled out of the door.

Well, I submit, Ladies and Gentlemen, that that isn't what Art Warner, certified mechanic for this aircraft, indicated could ever happen and for the following reasons. One, if you recall Warner indicated that the door had to open some thirty-six inches

before the snubber engaged, which means that there is no way that you can tell if the snubber is going to work before it is opened to that extent.

Two, that no way in which a person holding that chain could, in any event, be propelled out of the door.

Now, what concerned Winston even more in this regard was that there was no communication that the door was -- had free-fallen. Kleitz indicated that it did. But as a matter of fact, Warner said that he didn't get the call from the airplane radio, but rather got it from the telephone, a field telephone, and that when he took the callthere was no mention of that door having free-fallen. When he sent the mechanic,Fred Maize, over to fix that door, he sent him over with another door -- a snubber handle to replace it, and he had no knowledge of that door having free fallen. It was only when he was over there that Maize learned that the door had free fallen.

Winston became concerned because he knew that this door was part of the structure of the Metro. He knew that if this door twisted, were ever able to be closed, that the aircraft, itself, would not be air worthy, and had Fred Maize been able to close the door of that Metro, then that Metro could have gone

up in the air, and it would not have been air worthy.

Now, the Government does not place any significance in this incident. Apparently they don't feel that Winston should be responsible for the air worthiness of the aircraft. They don't feel that Winston should impress upon his pilots, the importance of identifying damage to the aircraft in order to prevent an aircraft which is damaged, to be in the air with passengers.

In any event, the Government case, will show that it isn't really that important because, look at these other fellows, and then they go down through a list of pilots who apparently had some kind of injury to the aircraft in the past. And in each and every one of these cases; Briggs, Herrington, Pusztai, Winston indicated that in his judgement it was not a pilot error, it wasn't even pilot negligence, and that there was no deliberate or intentional act on the part of the pilot regarding this damage. Now, Winston's suspicions were not exactly unfounded, and I refer you now to Defendant Exhibit N and I read to you the first paragraph of this letter written by the Federal Flight Standards District office of the Federal Aviation Administration.

'On April 17th, 1975, while conducting an air taxi inspection of Commuter Airlines, Inc.,

Mr. Jerry Winston, president of Commuter, brought to my attention two items which he believed to be sabotage. I do not know if any of those two acts were willful, but in my mind, the broken door handle cannot be caused by the action described by the co-pilot. The break in the handle was in the opposite direction from the door, and the upper attached point was bent upwards, away from the direction the door descends. In my opinion, the failure was not caused by normal wear or use.'

You saw the slides, and you saw where the snubber was taken off and a grocery string was substituted. That allowed the free-fall and the string was not broken, much less the snubber handle. So I submit that Winston had ample reason to feel that there was more to this story than was being told to him, and justification for the discharge of this pilot.

The next incident was Lamos on December 22nd, and again, it would appear from the Government's case that once the Teamsters organized this company, that the company better be careful as to the manner in which they gave orders to the pilots. If you recall, Lamos was coming in on a flight from Newark, I believe to Binghamton, the last leg of the flight was to Elmira. He had one or two passengers, and the scheduling office had decided that they would use a smaller plane, a

Dumont because it would be less expensive to use for the last leg.

The airplane had been worked on in the hangar, and it was company policy, and no argument about that, that the plane had to be test flown, and Lamos was the only pilot available to test fly that airplane. He was asked to do it. He refused to do it. He not only refused to do it, but he proceeded to spend twenty minutes arguing about not doing it, and he proceeded to call the boss' wife a liar, and he proceeded to interrupt the boss' meeting with some other officials, all of which was a direct refusal on the part of the employee to obey an order of the company.

Now, it wasn't Lamos' concern as to whether or not those passengers were late. If those passengers were going to be upset at anyone, they are going to be upset at the company. If we are going to lose those apssengers, it is the company who suffers, not Lamos. His only concern is to follow orders of the company.

When he was told to test fly this airplane, he was required to test fly the airplane, and I don't think that this fifteen minutes had anything to do with it. I think that, for reasons best known to Lamos, he had blown his top and he was all through, and that is

exactly what happened at that time. And I think that the discharge was amply warranted, from the evidence.

I don't care if there is union organizational activity, or whatever in the company. Are we sugge sting that the company no longer has a right to give orders? Are we suggesting that the company must review carefully their orders, and whether it is a good judgement or bad judgement? Are we saying that these employees are required to obey the orders of the employer? Nor do I think that this indictment, should, in any way, change the right of this employer under those circumstances.

We now come to Ronald Williams, discharged on the 19th of December of 1974. Again, apparently, no emphasis was placed upon his failure to get his A.T.R. by the Government.

Now, to go back to our criteria again, I will ask you: Did you hear any evidence as to Williams' activity in the union? The only thing my notes show is that the union meetings, at one point it indicated he spoke out, and I think that he said against the union or that is what my notes seem to indicate But apart from that, the Government has introduced no evidence whatsoever regarding this employee's union activity. The Government has introduced no evidence as to what the Defendants knew about this so-called activity, if

there was any, whatsoever.

So that the first two elements of what I consider to be basic, there has been no evidence intorduced whatsoever.

Now, was he discharged because of union activity? Well, Williams had been with the company a long time, a long time, and he never became a pilot, which I think is significant from many of the others that you have heard who testified, that got their A.T.R.'s, on both sides, the Defendant and the Government. Here is a pilot who had been there almost six years, and still hadn't gotten his A.T.R. and still had not advanced to becoming a captain. I can't help but think that maybe Winston's opinion at the time that he discharged him was correct, and maybe this man didn't want to fly and didn't like to fly, and most of these young men that you saw testified in the courtroom these past two weeks are young men who generally enjoy flying, and no one is saying that Josephson, Slough, or anyone of these are incompetent. We are talking about the level of proficiency.

But in any event, let me say that Williams went, or was attending an October, 1973 meeting between management and the co-pilots. Now, there was some mention in the testimony that he was an organizer

of this meeting. I don't want you to confuse the fact that being an organizer of this meeting is the same as being an organizer of this Teamster activity that came up some years later.

Williams, apparently, was a spokesman at this meeting. The co-pilots had certain demands that they wanted a three-step salary increase over a three-year period. Management -- well, they wanted more money, obviously.

Management took the position that they would go along with that, but by the same token, they were expecting, at the end of that three-year time to have gotten their A.T.R.'s and to have advanced to the rank of captain.

Now, Williams knew this. Herrington had spoken to him about it, and Bell had spoken to him about it. As a matter of fact, it got to where Williams realized that it was necessary for him to enroll in a school down in Florida to try and accomplish it. But he didn't accomplish it. Several times he took tests flight tests, written tests. In any event, he spent several weeks down there and failed to get his A'R.

When he got back up here, Mr. Shananan has indicated what steps the company took to try to assist him to get his A.T.R's up here, but of course

he showed little or not interest in completing the training.

Management had already put him on the list, and they had ample reason, under the circumstances to discharge Williams, and the mere fact that there is organizational activity at this company, didn't mean that they had to compromise, or change their standards. They had the right to ask the co-pilots to become captains in three years, and they insisted upon that right.

The other factors entering into Williams, his realtionship with passengers, and incidently, that was the reason that he was discharged several years before, his run in with the president of the New York State Gas and Electric Company, and incidently, my recollection is that the president apologized because he had lost his temper, and not because of what had happened at the incident. All of this obviously had a bearing upon Williams. I am not saying that anyone individually would warrant dismissal, but I am sure that this was going through the boss' mind all during the time and all of this type of work is personal relationship, and relationship with the public. They have got to expect to serve and get along with the public, but particularly when you consider late flights, and this

kind of problems which all of us have experienced.

So I submit to you that the evidence strongly supported, fairly supported that the company had ample ground for his dismissal, and there is no evidence as to the fact that they knew of his activity, and if they knew of the activity, that he was discharged because of that activity.

Now, Winston, despite his optimism, and even after October, he was delaying his cut back, and he indicated to you, he finally realized in February that he had to reduce his staff down to the number of seven. And this brought up the final stages of the cut back, namely Hummell and Larimore.

Again, going back to our criteria, neither case had any evidence of union activity. In neither case has there been any evidence that the Defendants knew of any activity. Were they fired because of union activity? Winston indicated the economic picture was not changing, it was getting worse, and it was introduced in evidence, and you have it here, and you can look at them, and the flight schedules showing a reduction in the flights. Everything was pointing to the fact that he had to continue cutting back.

So as a consequence, he, again, entered into an evaluation session to determine what co-pilots

were going. Hummell was selected. They brought in factors like probation, the fact that he never bought a uniform, and how much interest he was showing.

You heard the testimony, and Metro pilots were required to have a uniform, but by the time he left the company, he had not bought a uniform. Does that show much interest in the company?

There have been some questions of missing money. Mr. Winston's testimony, as I listened to it, he is not undertaking a character assasination here. It was reported to him by the accounting office, not only in Hummell's case and Larimore, but several others, Williams included, that there was missing money on flights.

These men and co-pilots were responsible for collecting the money. He eventually turned the whole matter over to the state police for investigation.

But he had every right to believe that this was negligent management, negligent administrative duties on the part of these co-pilots in the manner in which they were handling the money, and that was his only point: he felt that they were simply not paying attention to their duty, and this, of course, became a factor in his consideration as to whether they should stay or not stay with the company.

Finally, he considered both the non-

availability of Hummell and on certain occasions, again, and not this fact, but this fact alone did not warrant a discharge, and we are not attempting to say that. But that the total picture certainly did. And then, finally, in Larimore's case, frankly, at least in my opinion, Winston had ample doubt, to discharge. Are we saying thatWinston does not have the right to demand loyalty and respect from his employees? Employees who are handling the public, and the many employees who are always exposed to the public? Larimore, and you heard Pusztai and you heard Herrington both testify about this

At the National Airport in Washington, D.C., for some reason he got extremely upset at Winston and called him a 'son-of-a-bitch.' If he had said it softly, it probably wouldn't have been a problem, but no, he had to make a public spectacle of it, and he had to say it in the presence of passengers. Well, what would you expect a company to do under these circumstances? Don't they have a right to ask for loyalty, and respect, particularly when they are serving the public? What kind of the employees do the Teamsters want us to have under those circumstances? In my judgement, when Larimore called Winston a son of a bitch, that his days were numbered, and frankly I don't blame Winston one iota because of it. Nor do I think that union activity

Teamsters or otherwise, should change the criteria in any company in this country.

Now, we have had some references, and let me move on to this next point for a moment. Defendant's Exhibit H was put in evidence simply to demonstrate to you the turn over at Commuter Airlines from 1970 to 1974. It was done because we did not want the Jury to have the impression that this was an unusual year for turnover; that more employees were being fired this year, or resigned this year than any other year. So based upon the payroll records, this chart was made up and is now in evidence for your review. And it shows that percentage of turnover of employees for the year in question, twenty-nine percent in 1970, and thirty-eight in 1971; thirty-one in 1972; forty-one in 1973, and the year in question, thirty-six percent, which doesn't show any significance one way or the other.

Then, from the same payroll records there was a chart which was prepared, and is an exhibit, to show you the ratio of the total number of pilots discharged to the total number who left the company in that particular year.

In other words, three pilots in 1970 were discharged out of a total of eight pilots or a percentage of thirty-eight percent. Again, it was

fifty-six percent in 1972; 1973 it was four pilots discharged out of a total of eleven pilots, and thirty-six percent; then finally in the year in question, 1974, five were discharged out of a total of twelve who left the company.

Again,no particular significance to the percentage, other than what falls within the normal range of turnover of these employees at Commuter over the past few years.

And as Mr. Winston stated on the stand, co-pilots, frankly, are easily trained, and they do come and go.

The final exhibit, actually shows the percentage of those pilots discharged to the total number employed at the time and again, 1970 it was eleven percent; jumping up to 1972 with twenty-seven percent; and 1973 with fifteen percent, and 1974 with fifteen percent.

Again, demonstrating no particular significance in the turnover of the employees in regard to whether they were discharged or resigned, and those exhibits were introduced for that purpose and for that purpose only.

Now, there was one other point that I wanted to cover with you because Mr. Chalenski stated

from his charts that at the same time we were discharging pilots, we were also hiring pilots. And it is important for you, and I will use his chart, for you to keep in mind exactly what the evidence shows, and what the payroll records show.

The name which he indicated at the bottom was, of course, Paul Darby. Mr. Winston indicated that Paul Darby was hired on May 4th, 1975, and he was hired to replace a co-pilot by the name of Fairchild who resigned on 4/14/75.

Then Allan Gerrin, the next name, and he was hired on May 4th, 1975, and again, he was hired to replace, in fact what he indicated, he was hiring two pilots to replace Fairchild because the turnover on these, as far as meeting the flight requirements and the proficiency ratings, that he loses co-pilots in that regard.

Frank McKeon hired on April 13th, 1975, and he was hired to replace Tom Lewis who resigned on March 1st, 1975.

Then, John Morreity , who was hired on March 23rd, 1975, and was hired to replace a co-pilot by the name of DeLaurentis, and you heard his name much earlier, and he resigned on March 2nd, 1975.

And finally Potterman, who was hired on

February 9th, 1975, and he was hired to replace Excell who retired in January of 1975.

And then Ivar Ore, who was hired in September of 1974 and had quit October 20th, 1974.

In any event, there was no reduction in the pilot's staffing of this company in either the fall of 1974 or the Spring of 1975. Winston reduced his staffing down, and the only replacement, the only hiring that went on were for those pilots who had resigned.

Ladies and Gentlemen, in my opinion, the provisions of the law were never enacted to prevent a person from operating his business. Winston, in 1973, had decided to expand, and that when he saw the handwriting on the wall in the fall of 1974 and the summer of 1974 as it began to develop, as the picture began to develop, he had to make certain business decisions as far as cutting back his staffing.

Now, in the absence of this union organizational activity, this decision would have been made, and the staff would have been reduced, and he would have gone on as the company has in prior years.

But because there is organizational activity, the Government is now asking us to, in effect, saying that the Defendants no longer have the right

to discharge probationary employees because of their performance, no longer have the right to maintain high quality for their equipment, for their pilots, and no longer have the right to require some respect from their employees. All of this, apparently, has changed by reason of this organizational activity.

If whoever is responsible for this indictment, if what the seek is penalizing Winston, there is no question now that his family has suffered despair and concern, and there is no question that this trial, and the preparation of this trial has interrupted his business, and indeed, he has been penalized. Indeed, he has suddenly realized that the freedom which he enjoyed previously in the operation of his business has suddenly drastically been curtailed.

I submit,on a review of all of the evidence that you will return a verdict of not guilty.

THE COURT: Mr. Chalenski, any rebuttal?

MR. CHALENSKI: I will try and keep this mercifully short.

THE COURT: First, I think that we will take a recess and kind of cool off.

(Whereupon, the Jury was excused.)

THE CLERK: Court stands for a short recess.

(After a short recess, the proceedings were resumed before the Court and the Jury.)

MR. CHALENSKI: Ladies and Gentlemen, how many times did you hear testimony where Winston said, 'Let me have your support, and I want to know who is loyal to the company,' and he denied it on the stand. How many times did his attorney say that? You have heard it used throughout the trial. Anybody who is opposed to him is not loyal to him, and has to go. Union and management? It is a healthy competition between each other, and each one is trying to get what they are entitled to.

It is a balance, and it is not destroying, but it is -- there is some kind of a warped mind that says when you join a union you are now disloyal to me, and we have got to cut you off, and that is what happened here.

Did the Defense Counsel answer the question I left? We are not trying to say or second-guess the Defense. We have produced evidence before you as to what the economic situation was back then. What did the Defendant, himself, tell his employees on October 5th? Can they explain how he made a decision on September 20th that the business was so bad that he had to moth ball a couple of planes, and just a couple

of weeks later he is telling his employees that business is growing, and commuters are day in and day out, and that it is a scheduled line. Also that they are planning to buy a new Metro.

He said this in that speech, that the contract that he bid on for I.B.M., he didn't tell you anything about that bid being turned down, and I don't think that that was in the evidence. Did he explain this Defendant's Exhibit Z? That is the August document from his son. That relates to September. It is events in September.

Did he explain why that was made up? Wasn't that made up after the Defendant Bell took the stand? You heard him being asked by both me and the Judge, what documentation do you have, and they went out and made up this documentation, and tried to say it was in the file from the beginning.

The employees fired for their union activities? Robert Slough named by Calder as an organizer. Ira Josephson, and then we have Robert Calder also in the meeting. Robert Slough arranged the meeting. Ira Josephson stood with him and was greeting some people coming in, and I don't know how long he stayed but a couple of minutes.

Michael Baan made the mistake of speaking

out, and he was the only one that seemed to speak out with a question.

Mr. Sholl, Paul Sholl did not give Winston his ballot. He was a fellow organizing the meeting in the Pen-View Apartments, and the second one that followed, Paul Sholl was the fellow that arranged those and set up the rooms and got the coffee machine going.

Bill Lamos. He was the fellow also that didn't give Winston his ballot. It was his own personal business. He was the secretary and taking notes, and preparing a statement for Winston, back in August at the captains' meeting.

Mr. Williams, an organizer, active in 1973, for the active employees, and told Winston that you can have this ballot but I can get more.

Mr. Larimore, a couple of days before he was fired, Bell told Mike Kleitz, 'Tell Larimore to watch out for his union activities.'

Mr. Hummell, he refuses to give Winston his ballot, and we don't know what his other activities were. They were all involved in it.

Something about ballots being solicited after the election. You will recall that one witness has said that the Defendant approached him and said this with regard to the second ballot, 'In continuing

support of the company would you again be willing to again show your support by giving me your ballot.'

Mr. Solberg testified that no conversation after -- that he had no conversation with the Defendants after the election regarding his vote in the election.

Now, the showing of the business downturn. Mr. Richards quoted some figures from a financial statement here. You will see quite a list. I don't know whether you have any accountants among them, or something like that, but something about income before taxes. That was after depreciation, and that is not out-of-pocket expenses but it is something about for tax purposes. He had $200,000.00 more for depreciation in expenses than he did in 1974, if you take this depreciation and discount that, and he actually had more operating -- no, within $3,000.00 between 1974 and 1975. That is not really relevant as to who you employ. You have to employ people to generate gross net, and in the net income, and not your profits. But in any event, the profits were the same, excluding depreciation.

Now, just a word about these exhibits. Do you recall I asked the Defendant Bell on the stand where they were made from, whether they were made from company records or his own recollection, and it was his own recollection. The only company records, or any

evidence on those was the Government and we put in that. We had John Levan. We went through all of the records that were produced here. The Defendant comes up, not from company records, but from his recollection.

Discharges? Well, discharges or quit? Who knows what that is. A person who goes off on leave of absence and gets another job and doesn't come back, is that a discharge? A layoff? Part-time employees? There is a list -- well, here is a list that we did, that Mr. Levan said that he went through, and took all of the persons who were pilots and co-pilots, from the payroll records, and then when Mr. Levan identified the source from that, the records of the company showed layoff, and when the records didn't show anything we had to go to other witnesses, and in each case the records of the witnesses were completely consistent. If you want to refer to it or use the Defendant's Exhibits, please take a look at ours too, is all I am saying.

There are big problems in this case with the Defense. The consistency of their stories. I am not going to say that everyone of the Government's witnesses were consistent in every respect. They did not hurt us substantially, but they hurt in some places. And sure, Josephson was spoken to in some places by Winston, and they admitted it freely. They weren't

afraid to come here and tell you the bad with the good, and whatever it meant, that is how it was. It was the truth.

The Defendants, either one of them, sit there and tell you what time they had a meeting on September 30th. It had to be a long meeting but it was critical as to time because it had to be, the Defendant Bell said, after the incident in Elmira, where there was one passenger overbooked because they claimed they discussed that.

The plane didn't leave Elmira until 5:15, and who knows when it got to Binghamton, how long did it take to discuss each one of the co-pilots in the detail that they had to discuss them? It would have had to have been a late evening's meeting and they would have had to have known about it. They didn't recall it. Their memory is convenient.

Defendant Winston, it is curious, that any time he couldn't recall something, it was an obvious denial. No attempt to try and answer any of the questions that I posed.

The Metros, he lied to his employees about getting the new Metros, or else he lied to you about putting the two in mothballs. He lied to the pilots about the wages, and lied to the co-pilots about

the wages of the pilots. . . the thirteen or fourteen or fifteen thousand dollars, and our pilots are making a hell of a lot more than that.

And Mike Kleitz was there, since 1971, or something like that, and he was there at an annual salary of $9,500.00 with overtime, and it came out to about thirteen.

Mr. Winston told you at first that when he first took the stand that we were investigating providing jet service and ultimately rejected getting that. It was his bid that was rejected.

What about the interest? Thirteen percent interest? We have extensive testimony on Friday about the thirteen percent interest being paid on the Metros involved. Was that the whole truth? Financial statements turned over showed that they were paying only six and seven and a half percent on two of them.

Tales about the business growing to the pilots, and this August memo.

The Teamsters? He said he first knew the Teamsters were coming in on the seventh, and you can see that Jimmy Hoffa wasn't purposely said, and it didn't register on the fifth. His memory on any of the questions that his Counsel asked him was just like that there, everything, and convenient facts.

If I asked him anything, he had conveniently forgotten.

Okay. Is any of his other story reasonable? Laying off half of his staff? Never got down to the seven co-pilots that he said he did. As soon as the captains who were able to act as pilots for a while, achieved that status, he went right back in and hired new co-pilots, and he said one captain was hired in February to replace the captain that was laid off in April.

Two months anticipation?

I think that you can disregard that entire testimony of the Defendants Winston and Bell.

My recollection, and if after discussing it, you don't recall it or something like that, feel free to have the testimony read. My recollection is that Mr. Slough told Herrington that DeLaurentis, Josephson and Leonard were co-drafters of the September 24th, 1974 letter. What struck my mind was that when he came back from Bell, that all those facts weren't mentioned. As I recall, only Leonard was, and possibly DeLaurentis, and I don't believe that Josephson's name was mentioned. If you can't recall it, feel free to have the testimony read, but that is my recollection.

Something was made about the scheduling on Thursday morning to get these folks in. Well, I fail

to see what was so important about scheduling somebody to come in to work on a Thursday morning. Is that any big deal? Did they show that some special scheduling had to be made to get Josephson and Baan and company to their normal place of employment during a weekday? They didn't fly a lot of flights on the weekend. There was no big deal about having round-the-clock service here.

You will see if you check the records that all of the flights from Elmira had one stop -- all flights from Elmira went into Binghamton, so there is no showing that anything special was done, even in regard to Bob Slough to get him from Elmira to Binghamton. A normal course of business. They can point to it all they want but those guys were in Binghamton no matter what, on Thursday morning.

That tape, I don't know whether anything was proved with that. The expert never examined Mr. Williams' tape recorder. Sure it was a monaural recorder but you heard the experts say that the tape recorder heads, and maybe some of you do know about them, but I don't know that much, but they are replacable, and their witness said that a stereo head could be wired to a monaural tape recorder and do whatever happened.

Mr. Williams said that he had something

done, there was an examination of it, and we don't know what work was done to it in the meantime.

The Defendant Bell said that he said something about check rides in the afternoon and that is not on the tape. None of the witnesses seemed to recall -- none of his witnesses seemed to recall that. You might wonder whether they were trying not to recall anything that might hurt their employer's position.

Defendant Bell said that he said in the morning that he started by saying that, you know, I fly with you, and we fly the same equipment, and schedule, and I try and pressure you on your good days and stand behind you on your bad days, and then they said the same thing that was in our transcript about the rules and policies, and if you want to refresh your recollection on that, all right.

What it all boils down to is that none of the equipment and scheduling had nothing to do with the rules and policies. It was only flying, and you heard Mr. Reeve, one of their own witnesses testify that over the course of about five years, he had flown with Bell quite a few times, and it was about ten or eleven on the check rides, and five or six on even route checks and three times otherwise. So was Bell really talking about the other times when he said I have bent a few

rules and regulations?

Then, this Golden West contract. I said in my beginning remarks that what is important is the options that the Defendant Winston has to take action based upon what is going to happen. What was going to happen first if the union gets a contract, and that is based on what would happen in the natural course of events, and whether that was a threat. The options that he has, he could close the business. He controls it. It is not a for-gone conclusion. If you have already made a decision to close your business, that is okay. If you have got good economic justification, for taking some action, and you have already decided to do it, and even if you have decided to do it because, just because of the union, that is okay, and you can say it. But if you leave the employees in a quandry as to what you are going to do, that is the threat, and that was here.

The Sholl door incident? I think that what is important is what Mike Kleitz said, did and saw, and what happened. Mike Kleitz knew what happened, and saw to it that the plane went back to the hangar. There was no question that that plane was going to fly again. Mike Kleitz heard Sholl tell the maintenance men what was going on.

Would you like me to keep turning these

pages?

Now, considering this act, this act as voluntary in turning over the ballots. Would the employees have lied? Is the man who is doing something voluntarily doing it knowing that it is a fraud? No, if it is voluntary, the employee would have given his ballots over to Winston and never requested another ballot. On the allegation of receiving ballots after the election, Mike Kleitz and Jan Solberg, and Paul Floto wouldn't have turned the ballot over, and told him that they didn't vote when they actually did. That was coercive.

The discharges. Most of the cases involved the discharges. Sure, an employer can discharge his employees, but if that discharge is in any part motivated by anti-union activites, that violates the law, and that is a question of fact that you have to find. You heard Defendant Bell testify on October 3rd of 1973 that he didn't cancel any flight. That they didn't sell any airplanes, and they didn't refuse any charters at that time. That there were no other firings at that time of maintenance personnel.

They have not pointed to any economic factors that aren't clearly established in the record from their own mouth, as not being present.

It is clear that the Defendants seized upon those, subsequently, and that the employees, that they fired, were engaged in union activities, and that the Defendants did know that they were, and that the employees were fired because of their union activities.

The act guarantees certain things to the employees and it was not given to them in this case, and that is why the employer is here, and not because he fired somebody, and not because he fired anybody else, but eight men were not allowed to do what the Railway Labor Act guarantees them, and that is to choose a representative of their own, and I urge that you find the Defendants, all four Defendants, guilty as charged.

Thank you.

THE COURT: It is late in the day, and there is a substantial amount in the body of the law that I must instruct you about and it will take some time.

I regret that, but there is a lot of law involved in this. So we will adjourn now until tomorrow morning and we can go at it with refreshed minds.

Don't talk about the case, and don't let anybody talk about it with you.

(Whereupon, the Jury was excused.)

THE CLERK: Court stands in recess until ten o'clock tomorrow morning.

(Whereupon, Court was recessed at 3:50 p.m. until 10:00 a.m., the following morning.)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

Plaintiff :

-against- : CRIMINAL NO. 75-CR-83

JERRY WINSTON, BR[illegible] COUNTY AVIATION, INC., COMMUTER AIRLINES, INC., and THEODORE (TED) BELL, :

Defendants :

----------X

CONTINUATION OF PROCEEDINGS in above-entitled matter, came on before the United States District Court, Northern District of New York, at Auburn, New York, on Thursday, June 17, 1976, at 10:00 o'clock a.m., before the Honorable Lloyd F. MacMahon, United States District Judge.

Volume XIII

A P P E A R A N C E S:

The Honorable JAMES M. SULLIVAN, JR., United States Attorney, Northern District of New York, Federal Building, Syracuse, New York, by ARTHUR A. CHALENSKI, ESQ., Assistant United States Attorney, Of Counsel.

- and -

BECKER, CARD, LEVY & RICHARDS, P.C., 141 Washington Avenue, Endicott, New York 13760, Attorneys for Defendants Jerry Winston, Broome County Aviation, Inc., and Commuter Airlines, Inc., by RODNEY A. RICHARDS, ESQ., Of Counsel.

- and -

PAUL R. SHANAHAN, ESQ., Syracuse, New York, Attorney for Defendant Theodore (Ted) Bell.

(Whereupon, the following took place in Chambers, Judge MacMahon, Mrs. Young, a juror, and the Court Reporter being present.)

THE COURT: Go ahead, Mrs. Young.

MRS. YOUNG: Your Honor, I said that I have been very upset over the case; that I have no personal involvement in it, but I feel that maybe I am over-analyzing everything, and it would be very hard for me to accept the concensus of the Jury, and that I would be miserable if I felt that there was something I didn't feel had been established, and of course, I realize that I could say tnat I disagreed, but somehow it is not a case of actually disagreeing. It is a feeling tnat it hasn't -- is it all right for me to say this?

THE COURT: I don't want to know what has been going on in the Jury Room, or any thoughts by the jurors. I just want to know whether you can -- do you feel that you should continue serving on this jury, or whether you are so upset and you feel that you better not serve?

MRS. YOUNG: I think that the point is that I would feel a great deal better by not serving, but I have moral scruples about withdrawing. I think that I have something to contribute to the

discussion of the case.

THE COURT: Well, obviously, that is one of the reasons people are picked for jury duty. I really don't understand your problem, but I will put it up to the lawyers and see what they say.

MRS. YOUNG: Thank you, I think that is enough.

(Whereupon, Mrs. Young was excused, and the three attorneys involved in the case were brought in to Chambers where the following took place.)

THE COURT: Mrs. Young, wanted to see me this morning and before she started to talk, I called in Hi Sheffer, our Court Reporter, and here is the substance of what she said.

(The previous remarks between the Court and Mrs. Young were read to the lawyers present.)

MR. RICHARDS: I don't understand what she is saying.

MR. SHANAHAN: I don't either.

THE COURT: Well, let's go back into the Courtroom.

(Whereupon, the following took place in the Courtroom, without the presence of the Jury.)

THE COURT: I would like to get a consent on this.

Considering what the juror had to say, I feel

that the juror will be excused, and I am going to move over the first alternate.

Are there any objections?

(Whereupon, the Jury was returned to the Courtroom and the following proceedings were held.)

THE COURT: Mr. Day, would you take juror's seat number eleven. Juror number eleven has been excused.

(Mr. Day, alternate juror number one, took juror's seat number eleven.)

THE COURT: Before commencing these instructions, I want to thank you for your prompt attendance, and your cooperation with our schedules in this case, and for the careful attention that you have given to the evidence.

At this point, you have heard the argument of Counsel, and you have heard all of the evidence, but you haven't yet heard the law.

Now, all of us in this Courtroom have different functions. It is the lawyers' function to prepare their case, to present it to you, to examine and cross-examine the witnesses and to argue their version of the evidence at the close of the case and in their summations.

It is my function to instruct you, at this

point, on the law, and I am the exclusive judge of the law. I am sure that some of you noticed yesterday I had to interrupt one lawyer and say that I would not charge that. It isn't the lawyers function to tell you what the law is, although in this area, it is pretty hard for a lawyer to make an argument without some reference to the law, so I allowed quite a bit of latitude on that score yesterday.

But I want you to remember that the law is what I say it is: I am the exclusive Judge of the law, and it is your duty to accept the law as I give it to you, whether or not you agree with it, and whether you think it ought to be something different than what it is. In short, I am the exclusive judge of the law.

Now, just as I am the exclusive judge of the law, you and you alone are the exclusive judges of the facts. You and you alone decide what weight what effect and what value you will give to the evidence. You and you alone decide whether to believe none, or all, or part of the witnesses' testimony and, of course, ultimately you and you alone decide whether or not the Defendants on trial here, any of those defendants, is guilty or

not guilty of the charges made against him.

Now, you are not to conclude from any rulings that I have made throughout this trial, or any questions that I have asked, that I have any opinion one way or the other as to whether any Defendant is guilty or not guilty. As I told you earlier, that is your exclusive function.

Now, finding the facts is merely a process by which you, the jury, consider the exhibits which have been received in evidence, consider the testimony of all of the witnesses, both on direct and on cross examination, sift out what you believe, weigh it in the scale of your reasoning powers, and draw such conclusions as your experience and common sense tells you the evidence supports and justifies, and decide just where the truth lies in this case.

Now, in this connection, all evidence is of two general types: Direct and circumstantial.

Evidence is direct when the facts are shown by exhibits which are admitted into evidence, or, when the facts are sworn to by witnesses who have actual knowledge of them from what they have seen, from what they have heard, or something that they felt, or any intelligence that they have learned

through the exercise of one of their five fundamental senses.

Circumstantial evidence simply means drawing a logical inference or conclusion from other connected facts established by direct evidence.

No greater degree of certainty is required when evidence is circumstantial than when it is direct for in either case, you must be convinced beyond a reasonable doubt, before you can find any Defendant guilty.

Circumstantial evidence, therefore, is every bit as good, and indeed, it is often far more persuasive than direct evidence.

This classical example of circumstantial evidence is in Samuel Poe's story about Robinson Crusoe. Crusoe knew that he had not made that footprint on the beach, and so when he saw a human footprint on the beach, there was only one conclusion and that was that another man was on the island.

Now, not all circumstantial evidence is quite that compelling. But it is a process that we use in our daily lives, a process no different here. You draw logical conclusions from other connecting facts, conclusions that are based on your own

experience in the real world, and on your common sense.

Now, it is your memory of the evidence that controls. It is not the way that I remember it, and in that connection, I have no intention of reviewing the evidence here. I will spare you that.

It is not necessarily the way the lawyers remember it. If your memory squares with what the lawyers' version of the evidence was yesterday, you may accept what they say. But to the extent that you have a different recollection of it, you are bound to reject what they said, and to rely on your own memory.

Now, when I say your own memory, I mean your collective memories. Sometimes jurors are only out a few minutes. Sometimes jurors on television shows send in notes into the Judge that they want the testimony of this witness re-read or that witness re-read.

Now, if in the end you cannot remember testimony and if in the end, after trying to exhaust your own recollections, you cannot remember the evidence, you can have any part of it re-read. Bear in mind that in that event you have to hear both the direct and the cross examination, and any

redirect so that you get the whole testimony and it takes us some time to find it, because at that point, the trial record is on those tapes that you see Mr. Sheffer typing away on there. If you do want it, you can have it by sending me a note from your foreman, and try to pin-point what you want.

But first, try exhausting your own collective memory. One or more of you, I am sure, can stimulate or refresh the memory of other jurors.

Now, one of your most important functions is to decide which witnesses you will believe, and this is so as to every witness, whether called by the Government, or by the Defendant. You are not to be influenced by the number of witnesses called by either side. Your concern is not with the quantity but with the quality of the evidence in the testimony, and the first test which you should apply in determining whether to believe a witness is to measure what he says against your plain, everyday common sense. You are not bound to believe unreasonable statements, or to accept testimony that defies your common sense or, worse, insults your intelligence just because the statements are made under oath on a witness stand in a courtroom.

You saw the witnesses in this case. In

deciding whether to believe a witness you should consider not only what he said, but also his conduct and manner on the stand. I saw you watching these witnesses with particular care as they were testifying. Obviously, you were sizing them up. How did the witness impress you? Was the witness giving you a straight story? Was he being frank, or was he evasive? Was he trying to conceal or color some of the facts to his advantage? Was he just parroting answers? Does he have any motive to testify falsely? Is he interested in any way in the outcome of this case? How strong or how weak was his memory of important events? Did he forget the unforgettable? In short, can you rely on him? Can youtrust him? Was he biased or prejudiced toward either side in this case? Was he hostile or friendly on either side?

You ought to consider, also, his opportunity to know the facts about which he testified and the probability or improbability of what he said in light of the totality of circumstances and his opportunity to know what was going on.

When he tells you he can't recall, he can't remember, is that an honest answer?

How does his testimony add up when considered

with all of the other testimony, and probably more significantly, how does it check out against the contemporaneous documents that should have been made in the regular course of business?

Are there any inconsistencies in the witnesses testimony? And if so, how important are tney? Has he made any inconsistent statement on some earlier occasion, and if so, how important are those inconsistent statements? And in determining whether there were any inconsistencies in his prior statements, you should consider not only what he said, but what he failed to say, and what ne omitted.

Now, the Defendants, Jerry Winston, and Theodore Bell were witnesses. Neitner was required by law to do so, and his appearance as a witness was entirely voluntary. Had he not testified, nis failure to do so could not have been considered by you in any manner in determining his guilt or innocence.

Having chosen to testify, the law requires that his testimony be judged and appraised by the same standards applied to the testimony of any other witnesses, giving consideration and force to his background, to the strength or weakeness of his

personality, and to his natural interest in the outcome of this trial.

Now, if you find that any witness has deliberately and willfully lied with respect to any material fact, in his or her testimony offered at this trial, you may follow either one of two courses: you may accept as much of the witness' testimony as you believe, or if you wish, you can reject his or her entire testimony.

Now, before discussing the crimes charged here, I want to remind you that an indictment is a mere accusation. It is not evidence of the truth of the charges made, and you are to draw no inference of guilt from the mere fact that these defendants have been indicted. An indictment simply means that the Defendant has been accused of a crime. Each Defendant has denied the charges made against him or her, both by his plea of not guilty and by his testimony on the stand.

No Defendant has any burden of proof to sustain in this case. He is under no obligation to produce any witnesses or any evidence. He is presumed to be innocent and this presumption of innocence continues throughout the trial and during the deliberations of the jury. This presumption of

innocence is overcome when and only when the Government establishes the guilt of the Defendant beyond a reasonable doubt.

Now, what do I mean by 'beyond a reasonable doubt?' As the phrase implies, a reasonable doubt is a doubt that is based upon reason, a reason which appears in the evidence or in the lack of evidence. It is not some vague, speculative, imaginary doubt, not doubt based upon emotion, sympathy or prejudice, or upon what some juror might regard as an unpleasant duty.

Now, the Government is not required to prove a Defendant guilty beyond every conceivable doubt, nor every possible doubt, nor to an absolute or mathematical certainty, because such measure of proof would usually be impossible in human affairs.

You should review all of the evidence as you remember it. Sift out what you believe, discuss it, analyze it, weight and compare your view of the evidence with that of your fellow jurors, and if that process produces a solemn belief or conviction in your mind, such as you would be willing to act upon without hesistation if this were an important matter of your own, then you may say that you have been convinced beyond a reasonable doubt.

On the other hand, if after going through that process, your mind is waivering, or so uncertain that you would hesistate before acting, if this were an important matter of your own, then you have not been convinced beyond a reasonable doubt and your verdict should be not guilty.

Now, the indictment in this case now contains fifteen counts. Counts nine and seventeen have been dismissed, and I will send in a copy of the indictment so that you will have it during your deliberations. Each of the remaining counts charges a separate offense or crime, and you must consider each count separately. The indictment names four defendants, all of whom are on trial before you. They are: Jerry Winston; Broome County Aviation, Inc.; Commuter Airlines, Inc., and Theodore (Ted) Bell.

The guilt or non-guilt of each Defendant must be determined by you separately, as to each count in which he is named in the indictment.

In the determination of guilty or not guilty you must bear in mind that guilt is personal. There is no such thing under our system of justice as guilt by mere association. The guilt or non-guilt of each defendant on trial before you must

be determined separately with respect to him, solely on the evidence presented against him, or on the lack of evidence and on the law as the Court instructs you.

Now, in this connection, two of the Defendants Broome County Aviation, Inc. and Commuter Airlines, Inc., -- are corporations.

A corporation, in view of the law, is a person and it may be found guilty of a criminal offense. A corporation, of course, acts only through natural persons who are its agents. Any officer or agent of a corporation acting or failing to act within the scope of his authority may bind the corporation by his acts or failure to act.

In order to find a corporate defendant guilty, you must first find that all of the essential elements of the offenses charged here, which I will give you later, are present as to the corporation in the sense that officers are agents of the corporations, and here Winston and/or Bell acting within the scope of their authority, knowingly committed the crimes charged in the indictment. The scope of authority of the officer or agent is a question of fact for you to decide.

Just as in the case of the individual defendant,

the burden is on the Government to establish the guilt of a corporate defendant beyond a reasonable doubt.

Now, there is no dispute in the evidence here that the Defendant Jerry Winston was the head of both defendant corporations. As such, he was the chief officer and in charge of the conduct of the corporations' business.

Where an officer of a corporation, with broad express authority -- well, likewise, there is not dispute that Bell was the chief pilot in charge of the day-to-day operations.

Where an officer of the corporation, with broad express authority, holds a position of some responsibility and performs a criminal act related to the corporations' business, and the criminal act was directly related to the duties which the officer or agent has the broad authority to perform, the corporation is liable for the criminal act and must be deemed to have authorized the criminal act.

The directing heads of a corporation may be held criminally liable for acts of subordinance done in the normal course of business, regardless of whether the directing heads personally supervise

the particular acts or were personally present at the time, they were committed. It is enough if the directing officers caused the acts to be committed, or knew thatthey were being committed, and nevertheless, allowed them to be committed.

Now, all of the counts of this indictment are based on certain provisions of the Railway Labor Act, which applies not only to the railroads, trucks and other instrumentalities in interstate commerce, but also to air carriers and the officers and employees of air carriers.

I think it will help you in your task of deciding the issues presented to you here, if you understand something of the history and the object and purpose of these laws.

Long experience in the railroad industry taught that labor disputes and strikes and the resulting interruption of interstate commerce had a destructive impact upon the entire economy of the nation. Experience had also shown tnat strikes and the consequent disruption of commerce, had adverse affects upon the nation's economy and were more likely to occur when employees were forbidden to organize, or to join or to remain a member of a union of their own choosing or when their only

recourse for resolving their disputes with their employer was to deal with a company union dominated by the employer.

Experience had also shown that labor disputes resulting in disruption of interstate commerce were far less likely to occur when employees and employers were free to choose their own representatives without interference by either side over the designation of represntatives by the others. So that those two representatives of each side could discuss and settle disputes, and conduct collective bargaining concerning rates of pay, rules, or working conditions.

Now, Congress, mindful of all of this, passed the Railway Labor Act, and specifically declared, as part of the law, that its purposes were to avoid any interruption to commerce or to the operation of any carrier engaged therein.

To forbid any limitation upon freedom of association among employees or any denial as a condition of employment or otherwise, of the right of employees to join a labor organization. To provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter. To

provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions. To provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Congress went on to provide, under the caption 'General Duties -- Duty of Carriers and Employees to Settle Disputes,' that is shall be the duty of all carriers their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

And that all disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively by the carrier or carriers and by the employees

thereof interested in the dispute.

Now, the Defendants here are charged in counts two through eight with violation of the sections of the Railway Labor Act which provides 'designation of representatives.'

'Representatives, for the purpose of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives of the other; and neither party shall in any way interfer with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purpose of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion, seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.'

Counts ten through sixteen charge the Defendants with violation of another section of the act, which provides, under the caption, 'Organization and Collective Bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier

forbidden.'

'Employees shall have the right to organize and bargain collectively to representatives of their own choosing. No carrier, its officers, or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees,... or to influence or coerce employees in an effort to induce them to join or remain members of any labor organization.'

Now, another part of the act makes it a crime for any carrier, its officers or agents willfully to fail or refuse to comply with its provisions, and expressly prhibits any carrier or any officer or agent of any carrier from in any way interfering with, influencing or coercing one or more of its employees in their choice of a representative or in organizing, joining or remaining a member of any labor organization.'

I think it will help you in your task, if I instruct you concerning the meaning of these various terms, and the relative rights and duties of the airline defendants, their officers, their agents,

and their employees.

Now, you will notice that the Act protects the rights of employees freely to designate a representative of their own choosing, and to organize, to join, or to remain a member of a labor organization, without interference, influence or coercion by their employer. Now, Congress has granted all of these rights to employees, and I will refer to them as protected rights.

The words 'interference, influence and coerce,' are not to be taken as prohibiting employer persuasion, or the normal relations and communications which are part of friendly relations between employer and employee.

'Interference,' as used in these laws, means to intermeddle, to interpose, to intervene, to obstruct, to discourage, or to intrude into the free exercise by employees of their right to organize or to join or to remain a member of a labor organization, or to intrude into their right to choose a representative to act for them in their disputes, and negotiations with their employer.

Now, the employer enjoys a constitutional right of free speech. He is, therefore, free to communicate his views to his employees. He is

free to express any views, agrument or opinion, including anti-union sentiments in general, or even his derogatory views about a particular union.

'Influence,' as used in these laws, does not mean that the employer is prohibited from persuading or from attempting to persuade employees not to organize a union, or that the employer is prohibited from expressing any view, argument or opinion opposing unionization, so long as the employer's statements are addressed to the employees' understanding and not accompanied by any threat, expressed or implied, or not intended to lead the employee to believe that he may suffer from the employer's action, unless he follows the employer's wishes about how he should exercise his protected rights.

The employer may even make a prediction that unionization will result in dire economic consequences to the company, so long as his prediction has some reasonable basis in fact and contains no open or veiled threats or reprisal, or coercion or promise of benefit, express or implied, for the employees' exercising or refraining from exercising protected rights, and provided the prediction was not motivated by an intention to interfere with, influence or coerce employees

because they have exercised, or are exercising a protected right.

One way of expressing it is, is there an iron fist in the velvet glove? That is the question.

While the employer is free to make predictions of dire economic consequences from unionization, which he honestly believes will occur for reasons beyond his control, he is prohibited from making express or implied threats that he will cause the happening of dire economic consequences on his own valition, if the employees vote for a union or exercise any of their protected rights against his wishes. In short, while the employer is free to make an honest prediction that unionization will destroy or injure the business, he is pro= hibited from theatening to destroy, injure, curtail or close the business on his own valition if the employees unionize or otherwise engage in productive activity.

To express it another way, an employer is free to make predictions of dire economic consequences which he honestly believes will be likely to happen for reasons beyond his control, but not to threaten to make sure that they will happen if the employees unionize against his wishes.

The essential question here is, what did the speaker intend, and what did he intend the listener to understand? Does the speech convey a message of coercion or threat of retaliation if the employees do not follow the wishes of the employer? Did the speaker threaten to retaliate by reducing or abandoning his business, thereby causing the employees to lose their jobs regardless of what the economic realities require? Was he making coercive threats, or honest forecasts?

In considering the question, you must take into account the economic dependence of the employees on their employers and the necessary tendency of the employees, because of the relationship, to pick up intended implications of the employer that might be meaningless, insignificant or innocent to a disinterested ear.

Has the employer knowingly and intentionally used coercive speech to threaten economic retaliation against his employees for exercising their protected rights, or to intimidate them from freely exercising those rights, or to retaliate against them for having exercised those rights?

Similarly, an employer's interrogation of employees concerning union sympathies or activity

may or may not be coercive, depending upon the setting and all of the surrounding circumstances. The test is whether the questioning tends to cause inference with, or restraint or coercion of , the employees in the exercise of their protected rights.

In determining whether interrogation is coercive, you should look not only to the questions asked, but to the setting and the surrounding circumstances. Is the questioning conducted in a manner, place or context reasonably calculated to intimidate the employee or instill fear of reprisal in his mind?

There are five factors which you should consider in this connection: the first of these is teh background. In other words, is there a history of employer hostility to unions and discrimination against employees who favored unionization.

Two, the nature of the information sought. For example, did the interrogator or speaker appear to be seeking information on which to base taking punitive action against the individual employees, or in other words, was he merely expressing his normal curiosity about a matter which affected his business?

Three, the identity of the questioner. In other words, how high was he in the company hierarchy?

Four, the place and method of interrogation. For example, was the employee summoned to the boss' office? Was there an atmosphere of oppressiveness, or of an unnatural informality?

And the fifth factor is the truthfulness of the reply. In other words, if the employee gave a false answer, did he do so because he was either made aware that he had something to gain by a lie or maybe afraid that a truthful answer would hurt him?

Bare assertions that the employee need not state his position or answer a question are not sufficient to eliminate what might otherwise be employer intimidation. You must make a searching inquiry into the nature of the question and the circumstances under which it was conducted. The question for you is whether, in the totality of the circumstances, the employer's questioning or statements were intended by him to produce fear, or influence or coerce his employee into acting in accordance with the employer's wishes. Or was he merely being persuaive?

'Influence,' here, thus means the conscious and intentional exertion of authority and power by the employer on the employee so as to order overpower, overbear, dictate, dominate or control the employees' will to pressure him into doing, or to refrain from doing what the employer wants, rather than standing up for his own rights and doing what he would want to do, or to refrain from doing if her were left alone to act freely.

The employer, therefore, is prohibited from exerting that kind of influence which destroys, imparis, inhibits, weakens or overcomes the employees' free will, or pressures him into submission to the employer's wishes against his own judgement and makes his action or inaction more the will of the employer than his own and in effect, substitutes the will of the employer for that of the employee.

'Coerce' means to overcome, to overbear, to override the free exercise of an employees' will or choice or action or inaction by pressure or force or by threat of pressure or force or by attempting to overcome the employees' will by any such means. Coercion thus means the use or attempted or threatened use of force, pressure,

authority or power by the employer to induce, or to dictate the employees' action instead of leaving him alone to exercise his own free and untrammeled choice in designating a representative, or in organizing, joining, or remaining a member of the union.

'Force,' as used here, includes the direct or indirect use or threat of the use of superior authority or economic power to dominate, or to dictate an employees' free choice of action.

Now, these laws are aimed at the abuse of the employer's power, or opportunity to corrupt or to override the employees' free will. Remember that one of the evils that congress was trying to get at with these laws was company dominated unions. Representatives were not to be chosen by spineless puppets, but by free men, with backbones.

In this connection, you should consider the importance of the prohibition to the entire regulatory scheme devised by Congress. Freedom of choice in the selection of representatives on each side is the essential foundation of the statutory plan. All the proceedings looking to amicable adjustments of disputes and collective bargaining agreements, indeed, the entire policy of the act,

depend for success on the free and uncoerced action of each party through its own representatives, to the end that agreement satisfactory to both may be reached and the peace essential to the uninterrupted flow of interstate commerce by air carriers may be maintained.

Those who are to make these decisions and adjustments must be freely chosen. They must be true representatives. Congress intended that that choice be made, as I told you, by free men, with untrammeled will, and without interference by the employer.

Now, a representative means any person or persons, labor union or organization designated by a carrier's employees to act for them in their labor relations with their employer.

Now, the Act does not prohibit any employer from discharging an employee for good cause, or for no cause, except that it prohibits the employer from discriminating against or discharging the employee for exercising, or for having exercised any of his protective rights. Thus, an employer has the right to discharge an employee for misconduct, inefficiency, poor performance, insubordination, violation of rules, unavailability,

negligence, neglect, or any other reason or because of a need to reduce the numberof employees due to loss of business, downturns in the economy, or the like, and all of these standing alone, are legitimate, valid, and permissible grounds for discharge.

In short, an employer is free to conduct his business as he sees fit, according to his best judgement, and to discharge an employee for any or no reason, provided the employer is not motivated in whole or in part by an unlawful intention to interfere with, influence or coerce an employee or to discriminate against him because he has exercised or is engaged in exercising a protected right.

Discharge of an employee, if motivated, therefore, wholely or partly by any intention to retaliate against him for the exercise of any of those protective rights, is prohibited.

The Government, therefore, must prove beyond a reasonable doubt that in discharging the employee the Defendant was motivated, either wholely or partly by an intention to punish, retaliate or discriminate the employee because he was exercising or had exercised protected rights.

Now, there is evidence here that in each instance, when the employee was discharged -- well, there is evidence that in each instance the employee who was discharged had engaged or was engaging in some degree in protected organizational activity, and that in each instance the employer based the discharge on a permissible ground, such as the employee's unavailability, neglect, or on economic grounds, such as loss of actual or anticipated business and the consequent need to reduce the number of employees.

Now, on the one hand, if an employer knowingly and intentionally discharges an employee, partly because of his past or present participation in a campaign to designate a representative or to establish, join or remain a member of a union, and partly because of his misconduct, negligence or the like, or because of the employer's expected loss of business or the like, there is nevertheless a violation of the law.

On the other hand, if the employer discharges an employee solely because of his misconduct, negligence or the like, or the loss of business or other legitimate economic reasons, there is no violation of the law simply because the employee

also happened to have participated in protected activities, or was engaged in exercised protected rights, and even if the employer was glad to get rid of him.

In summary, even if there is otherwise a good and legally sufficient reason or justification for discharging an employee, the employer, nevertheless, violates the law by doing so if an intention to interfere with, influence or coerce an employee in exercising or because he had exercised a protected right, plays any part in the Defendant's motivation. The Defendant's motive is the key factor in determining whether the discharge of the employee was lawful, or unlawful, and this depends on the Defendant's state of mind.

Now, obviously it is impossible to look into a man's mind. But evidence of a Defendant's state of mind and motive in discharging -- evidence of the Defendant's state of mind and motive in discharging the employee consists not only of the Defendant's Winston and Bell's direct testimony on that subject, but also the testimony of the discharged employees, and of the reasonable interference which you draw from the totality of the setting and the circumstances surrounding the discharge,

as they are shown in the evidence, including, of course, its timing, and the sequence of events.

Obviously, those are important factors to consider and a Defendant's true motive, and intent may thus be inferred not only from what he says but also fromthe way and the time when, and the place where he acts, in the context of all of the surrounding circumstances. Thus, the old addage, 'Actions speak louder than words,' applies here.

It is for you to gauge the sincerity or lack of sincerity of the Defendant's expressed motives.

In determining that issue, you should consider whether the expressed grounds were uniformally or discriminately applied; you should consider the timing of their application to the particular employee and his relationship at that time to union activity. You should consider whether they were based on reports made at the time of the event, or whether they were based on newly composed afterthoughts; whether they were true or false, real or manufacturered or fabricated, fresh or stale, serious or trivial and any other circumstances which you recall and believe which bears on the issue.

In that connection, you should ask yourself

whether the expressed permissible ground alone would have lead to the discharge of the employee if he had not also been engaged in the exercising of protected rights. Was the stated permissible ground the Defendant's sole reason for discharging the employee, or was it coupled with a pronibited intention, and a pronibited motive. Was the stated reason a sham excuse, a concocted after-thought, or a mere pretext to disguise the true motive and intention to interfere with, influence or coerce employees from exercising, or because they had exercised a protected right?

I have no reached the point where we will discuss the particular counts involved, and like the law, the applicable law which I have been instructing you about, and we will take a very short recess.

(Whereupon, the Jury was excused.)

THE CLERK: Court stands for a short recess.

(After a short recess, the Charge by the Court was continued.)

THE COURT: I will first instruct you concerning the counts two through eight, and we will work through the indictment from there on, and then go back and discuss count one, because count one is

really based on the same law and evidence that the subtantative or count two through fifteen are based on.

Count two through eight: first, count nine has been dismissed and the other counts charge that on or about the dates specified in each of those counts, the Defendant Jerry Winston, Broome County Aviation, Inc., and Commuter Airlines, Inc., did knowingly and willfully fail and refuse to comply with the terms -- and I will cut through this -- of the Railway Labor Act in that the said Defendants did interfere with, influence, and coerce their employees in their employees' choice of their representative by firing the respective employee pilot or co-pilot named in each of those specific counts, two through eight.

Now, in order to convict the Defendant whom you are considering on each of counts two through eight, the Government must prove to your satisfaction beyond a reasonable doubt, that each of the following elements:

First: that the Defendant was an air carrier engaged in interstate commerce, or an agent or officer of such carrier. There is no dispute here that the Defendant Broome County Aviation, and

Commuter Airlines were air carriers engaged in interstate commerce and subject to the Railway Labor Act at the times mentioned in this indictment.

There is likewise no dispute that the Defendant Winston was the head officer of both corporations and that the Defendant Bell, was the chief pilot in charge of operations.

The second element was that one or more employees of the carrier were exercising their right freely to choose, or of attempting to choose a representative to act for them as their collective bargaining agent, or had exercised that right.

Now, you have heard the testimony of many witnesses on this subject, and I do not intend to review it because I know it is fresh in your minds. There is really no dispute in the evidence that one or more employees were endeavoring to choose a representative, in the early fall of 1974.

The third element is that the Defendant discharged or caused to be discharged the named employee, again, there is no dispute in the evidence that each of the employees named in counts two through eight was discharged by the Defendants.

The fourth element: that in discharging or causing the discharge of the named employee, the

Defendant acted knowingly, willfully and intentionally, whoely or partly for the purpose of interfering with, influencing or coercing one or more employees in the exercise of the protected right, freely to choose a representative.

Now, there is a sharp dispute in the evidence about this element. Here the word 'knowingly' does not mean that a Defendant must know or be aware that his conduct violates the Railway Labor Act or any other law. In short, the Defendant doesn't have to know the law. It simply means that the Defendant must be conscious of what he is doing. In other words, that he is consciously interferring with , influencing or coercing the employee or employees in his or their free choice and free exercise of protected rights, or that he is retaliating against them, or him, for having exercised a protected right.

'Intentionally' means that a Defendant acts voluntarily, deliberately and on purpose, and not because of a mistake, accident, carelessness or other innocent reason. An act is done willfully, in the context of this case, if it done knowingly, intentionally, purposefully or deliberately by the Defendant, wholely or partly for the purpose

of thwarting the objects of the law to prohibit employees -- to prohibit the employers from interferring with employees' free exercise of their protected rights to choose a representative, and to bargain collectively, to organize and bargain collectively with their employer.

Before you can find that a Defendant acted unlawfully in discharging or causing the discharge of the employee, you must first determine that the Defendant knew that the employee had participated in, or was engaged in exercising his protected right freely to choose a representative. In this connection, you should consider the size of the Defendant companies, the number of employees, and the Defendant's general awareness or lack of awareness and attention to his business and what was going on around him.

You should also consider whether the organizational activites were open and obvious, or secret, and in either case, the number of people who knew what was happening and the likelihood or improbability of a leak of information, and informant, or if you will, a grapevine carrying the message to the employer-Defendants.

You may find that a Defendant had such

knowledge if you find, from all of the circumstances shown in the evidence, including the time and sequence of events, either that the Defendant had actually been informed and actually knew that the employee named in the count that you are considering had participated in any way or was participating in any way in the exercise of the protected right to designate a representative, or if you find that the Defendant had a strong suspicion or was aware of a high probability that the employee had participated or was participating in choosing a representative but purposely closed his eyes and his ears, or otherwise deliberately avoided learning the truth about the employees' activities, in order to make his actions appear to be sincerely based on the grounds on which they were placed.

In determining whether the Defendant acted willfully, knowingly and intentionally in discharging the employee, you should consider whether his words and conduct were either wholely or partly motivated by an intention to interfere with the protected rights, or intended to thwart or frustrate the declared purpose of the law, to protect the employee's rights to choose their representative, and to organize without employer

interference.

You should also consider the relative economic strength of the employer and employee; the relative strength of their personalities; the interest in and activity of each about unions and organizational activities; whether the employee had a reputation as a trouble-maker, known to the Defendant. Also the justification, or lack of it, for the discharge and the statements and actions of the employer in the context of all of the surrounding circumstances relating to organizational activities.

As I previously told you, the employer has a right to discharge an employee. The law does not interefere with that right to conduct his business and that he has a right to dicharge him with or without good cause. But he has no right to discharge him either partly or wholely for the purpose of interferring with, influencing or coercing the right of his employees freely to designate a representative, or to organize or to join, or to remain a member of a union. That is prohibited.

It is your function to consider the evidence, discuss it, and to draw such inferences and conclusions from the totality of facts shown in the

evidence, and decide whether the employer's stated reasons for discharging the employee were his true motive and purpose, or whether a motive to trample on protected rights, or interfere, or coerce protected rights played any part in his conduct.

In this case, you may conclude that a Defendant has the requisite guilty knowledge and intent if you find, beyond a reasonable doubt, that he knew that the employee involved had participated in any way, or was engaged in any way in organizational activities, and that the Defendant was wholely or partly motivated by an intent to retaliate against the employee, or to discriminate against him for having exercised his protected right freely to choose a representative, or to interfere with, influence or coerce one or more of his employees in the exercise of that right.

Now, counts ten and eleven of the indictment charge that the Defendants, Jerry Winston, Broome County Aviation, Inc., and Commuter Airlines, Inc., did knowingly and willfully fail and refuse to comply with the Railway Labor Act in that they interferred with the organization of their employees, and influenced and coerced their employees not to join the labor by firing the respective employee pilots

or co-pilots named in each of those counts.

Now, in order to convict the Defendant whom you are considering on each of counts ten and eleven, the Government must prove to your satisfaction beyond a reasonable doubt, each of the following elements:

One, that the Defendant was an air carrier engaged in interstate commerce, or an officer or agent of such carrier, and again, there is no dispute about that.

Two, that one or more employees of the carrier were exercising their right freely to organize or join a labor organization, and again, there is no dispute about that.

Three, that the Defendant discharged or caused the discharge of the named employee, and again, there is no dispute about that.

And four, that in discharging or causing the discharge of the named employee, the Defendant acted willfully and intentionally, wholly or partly for the purpose of interferring with, influencing or coercing one or more employees in the exercise of their right to organize or join a labor organization, and in considering that element, you should apply what I told you earlier concerning

the issue of what constitutes knowing, willful, and intentional conduct within the meaning of these laws.

Counts twelve through sixteen of the indictment charge the Defendants, Jerry Winston, Broome County Aviation, Inc., and Commuter Airlines, Inc., did knowingly and willfully fail and refuse to comply with the Railway Labor Act, in that they interferred with the organization of their employees and influenced and coerced their employees not to remain members of the labor organization by firing the respective employee pilots or co-pilots named in each of those counts.

In order to convict the Defendant whom you are considering on each of counts twelve through sixteen, the Government must prove to your satisfaction, beyond a reasonable doubt, each of the following elements:

One, that the Defendant was an air carrier engaged in interstate commerce, or an officer or agent of such carrier. Again, there is no dispute about that element.

Two, that one or more employees of the carrier were exercising their right freely to organize or to join a labor organization, or to remain a member

of a labor organization. Again, there is no dispute about that.

Three, that the Defendant discharged or caused the discharge of the named employee, and again, there is no dispute.

Four, that in discharging or causing the discharge of the named employee, the Defendant acted knowingly, willfully and intentionally, wholly or partly for the purpose of interferring with, influencing or coercing one or more employees in the exercise of their protected right to organize or join a labor organization, or to remain a member of a labor organization, and here you will again apply what I have instructed you earlier on the subject of what constitutes knowingly, willful and intentional conduct within the meaning of these laws.

Now, count one of the indictment charges the Defendants, Jerry Winston, Broome County Aviation, INc., Commuter Airlines, Inc., and Theodore (Ted) Bell with a conspiracy to interfere with, influence and coerce the employees of the Defendant carriers in the exercise of the employee's free choice of a representative and in the exercise of their right to join and remain members of a labor organization,

by threats of reprisal if the employees should join a laobr organization, by requesting their employees to deliver their National Mediation Board ballots to the Defendant carriers, and thereby vote against organization, and by discharging several pilots and co-pilots.

Now, in order to convict the Defendant whom you are considering on count one, the Government must prove to your satisfaction, beyond a reasonable doubt, each of the following elements:

One, the existence of a conspiracy, from on or about October 3, 1974 to and including the date of the filing of this indictment, July 2, 1975, unlawfully, willfully and knowingly to interfere, with, influence, and coerce the employees of the Defendant carriers in the exercise of the employees' free choice of a representative, and in the exercise of their right to join or remain members of a labor organization by threats of reprisal, if their employees should join a labor organization, by requesting their employees to deliver their National Mediation Board ballots to the Defendant carriers and thereby vote against organization, and by discharging several pilots and co pilots;

Two, that the Defendant whom you are con-

sidering joined the conspiracy with knowledge of its illegal purpose;

Three, that any member of the conspiracy committed at least one of the overt acts set forth in the indictment during the existence of the conspiracy, and in furtherance of its unlawful purposes.

Now, the first element of the crime is the existence of the conspiracy. What is a conspiracy? A conspiracy, for our purposes, is simply a combination or an agreement among two or more people to violate the law by interferring with, influencing or coercing employees in the exercise of their protected rights in the manner, and by the means charged in the indictment.

Thus, a conspiracy is a kind of partnership in criminal purposes, and it is usually secret in its origin.

When persons enter into the gist of a crime -- I am sorry, the gist of a crime of a conspiracy is the agreement among two or more people to engage in the conduct which is prohibited by the law. This does not mean that they have to know that that conduct is prohibited by law. It simply means that they must knowingly agree to engage in that

conduct.

Nor does it mean that two or more persons must meet and sign a formal partnership agreement or that they must sit down and agree, in so many words, on what they are going to do, or what their unlawful plan is to be, or how they are going to carry it out.

When persons enter into a combination or an agreement to commit a crime, much is left to implication and tacit understanding. Only fools proclaim their plot, or publicly announce their purposes. The very nature of a conspiracy calls for secrecy.

The first element is satisfied, therefore, if you find, beyond a reasonable doubt, that any two or more people in any way intentionally combined or agreed to a common plan knowingly and intentionally to interfere with, the protected rights of the employees of the corporate defendants in the manner and means charged in this indictment.

Now, in determining whether there was such a combination, understanding or agreement here, you should consider all of the evidence about each Defendant's conduct, acts and statements. You should consider not only what was said or done,

but also how it was said or done. As I told you earlier, actions speak louder than words.

From the point of view of the law, there is danger to the public when two or more people combine to do something that is unalwful. The danger is greater than if the lone criminal acts by himself because two or more people are able to accomplish crimes that are more difficult to accomplish, and more harmful to the public cause.

Because of this, a conspiracy to commit a crime is a distinct crime in and of itself, separate and apart from the crime which it is the object of the conspiracy to accomplish.

Thus, you may find that a conspiracy exists, although the crime which it was the purpose of the conspiracy to accomplish was never committed, or if you find that the purposes of the conspiracy were never accomplished. However, the accomplishment of the purpose of the conspiracy is the most persuasive evidence of the existence of the conspiracy, itself.

It is not necessary for the Government to prove that the conspiracy alleged started and ended on the specific dates mentioned in the indictment. It is sufficient if you find that

a conspiracy was formed and that it existed for some substantial time within the period set forth in the indictment.

Now, you will recall that the second element which the Government is required to prove, is that a Defendant joined the conspiracy with knowledge of its illegal purpose. Here, I do not mean that a Defendant has to apply in some formal or informal way for membership in a conspiracy.

He doesn't say, 'Let me in on it -- count me in.'

However, before one can be found to be a member of a conspiracy, he must know of the existence of the conspiracy and of its unlawful purpose and voluntarily and knowingly join in the plan with an intent to combine with others to do the prohibited acts. He must knowingly promote the unlawful plan, or have a stake in its outcome.

In this connection, you will recall my earlier instructions, and apply them as to what constitutes knowing, willful and intentional conduct.

Here, in determining the knowledge and intent of the Defendant, it is again impossible to look into his mind. However, intent and knowledge may

be inferred from the way a Defendant acts, from the timing of his acts, by his statements and from all of the surrounding circumstances.

In this connection, you may not rely upon statements of one defendant to find that another defendant was a member of a conspiracy. You must determine the membership of a particular defendant solely from the evidence concerning that defendant's actions, that defendant's conduct, and that defendant's statements.

The mere fact that a defendant knows about the existence of a conspiracy, or be present when some of its acts are a carried out, or when it was formed, or that he may attend meetings, or even that he unwittingly assisted the plan, or the mere fact that he associates, or has a friendship or relationship with a member of a conspiracy is not in itself, enough to make him a conspirator, unless you first find, beyond a reasonable doubt, that he knew of the conspiracy, and that he intentionally joined in the plan with knowledge of its unlawful purpose.

Now, one may become a member of a conspiracy without knowing all of the details about a conspiracy, or without knowing all of the other

members. It is enough if he knows of one member and knowingly joins with others in a plan to violate the law, and this is so even though his role may be only an insignificant or subordinate one.

Now, if the defendant does join a conspiracy, then he is bound by what other say and do after he becomes a member, provided what the others do is in furtherance of the objectives of the conspiracy and provided he is still a member at the time.

This is because every member of a conspiracy is the agent of every other member.

Now, the third element of the crime is the commission by any conspirator of at least one overt act in furtherance of the object of the conspiracy. 'Overt act' means an act by any member of the conspiracy in an effort to accomplish some purpose of the conspiracy. The indictment in this case enumerates nine overt acts, but the ninth has been withdrawn, so we are concerned with only eight of them and they are;

One, on or about October 4, 1974, Jerry Winston,Broome County Aviation, Commuter Airlines, and Ted Bell fired Ira Josephson, Robert Slough,

and Michael Baan.

Two: on or about October 4, 1974, Winston, Broome County Aviation, Commuter Airlines, called a meeting of all pilots and co-pilots at which Winston made statements against organizing and Bell told the pilots and co-pilots that they would have tough check rides if they favored an organization.

Three: during or about November of 19[illegible], Jerry Winston, Broome County Aviation, Commuter Airlines, and Bell, met with pilots and co-pilots individually and solicited their National Mediation Board ballots.

Four: on or about December 9, 1974, Paul Sholl was fired by Winston, Broome County Aviation, and Commuter Airlines.

Five: on or about December 13, 1974, Lamos was fired by Winston and Broome County Aviation and Commuter.

Six: on or about January 9, 1975, Ronald W. Williams was fired by Winston, Broome County and Commuter.

Seven: on or about February 17th, 1975 Dennis Larimore was fired by Winston, Broome County and Commuter.

Eight: on or about February 19th, 1975,

James Hummell was fired by Winston, Broome County Aviation and Commuter.

Now, if you find that any of the overt acts alleged in the indictment were performed by any member of the conspiracy during the existence of the conspiracy, and in furtherance of its purpose, then that one act is sufficient to satisfy the third element, although you see the indictment alleges eight acts, proof of any one is sufficient.

And when I say proof of any one, I do not mean that the proof that the act -- that the Government does not have to prove that that overt act was performed by the Defendant whom you are considering. It is enough if the overt act was performed by any member of the conspiracy and done in furtherance of the conspiracy.

Now, you must consider each defendant and each of counts one through eight and ten through sixteen separately. If, as to the defendant whom you are considering, you find that the Government has failed to prove, beyond a reasonable doubt, all of the elements which I have instructed you, it is required to prove as to the count which you are considering, then you must acquit that defendant on that count.

On the other hand, as to the Defendant that you are considering, you find that the Government has proved, beyond a reasonable doubt, each of the elements which I have instructed you, it is required to prove as to the count which you are considering then you should convict that defendant on that count.

Now, you are instructed that the question of possible punishment of a conviction is no concern of yours and it should not enter into or influence your deliberations in any way.

The duty of imposing sentence, in event of a conviction, rests exclusively upon the Court. The function of the jury is to weigh the evidence in the case and determine the guilt or non-guilt of the defendant, solely upon the basis of such evidence.

When you retire to the jury room, you should elect one of your number to act as your foreman or forelady, and to act for you in your communications with the Court and in reporting your verdict.

During your deliberations, treat one another with consideration and respect, as I know you will. If differences of opinion arise, your discussions should be dignified, calm, intelligent. Your verdict must be based on the evidence, and the

law, the evidence which was presented in this case as you remember it, and the law as I have given it to you in this Charge.

You are each entitled to your own opinion, no juror should acquiesce in a verdict against his individual judgement. Nevertheless, I point out that no one should enter the jury room with such pride of opinion that he would refuse to change his mind, if convinced by intelligent argument on the part of another juror or jurors.

Discussion and deliberations are the very heart of our American, democratic jury process, and that process, in turn, is the very heart of our democracy. Your deliberations should be approached in that spirit.

A jury deliberation is jury discussion, and talk out your differences. Each of you should come in effect, decide the case for himself after thoroughly reviewing the evidence, and frankly discussing it with your fellow jurors with an open mind, and with a desire to reach a verdict. If you do that, you will be acting in the true democratic process of the American jury system.

There are twelve of you on this jury. The remaining alternate will be excused before you

retire for your deliberations. Any verdict must be the unanimous verdict of all of you and as to the defendant, and it must represent the honest conclusions of each of you.

I submit the case to you with every confidence that you will fully measure up to the oath which you took as members of the jury to decide the issues submitted to you fairly and impartially and without fear or favor.

Now, members of the jury, if you find that the Government has failed to establish the guilt of any defendant, beyond a reasonable doubt, you should acquit that defendant. If you find that a defendant has not violated the law, you should not hesistate, for any reason, to render a verdict of not guilty as to him.

But, on the other hand, if you find that the Government has established the guilt of a defendant beyond a reasonable doubt, you should not hesistate because of sympathy or any other reason to render a verdict of guilty.

Your foreman or forelady then, will return an oral verdict in open court of guilty or not guilty as to each defendant on each count.

Are there any exceptions, Gentlemen, and if

so, I will hear you at the Bench.

MR. CHALENSKI: No exceptions by the Government.

MR. RICHARDS: No.

MR. SHANAHAN: No

(Whereupon, the Marshalls were sworn in.)

THE CLERK: Mrs. Jones, you are now excused from the balance of this case.

(Whereupon, the alternate juror was excused.)

THE CLERK: The Jury will now retire.

(Whereupon, the Jury retired to the juryroom.)

MR. RICHARDS: Your Honor, may I have my request for instructions marked as an Exhibit?

THE COURT: I returned one to you, and in the margin I may have made some marks. Yes, you may have one marked.

THE CLERK: Defendant's Exhibit A-1, marked for identification.

(Document marked Defendant's Exhibit A-1, for identification.)

(To 2:15 p.m., the following occurred before the Court, all Counsel being present, in the absence of the Jury.)

THE COURT: We have had a couple of requests from the Jury.

THE CLERK: Exhibit one and Exhibit two were received by the Marshall this afternoon and marked as Court Exhibit.

Court Exhibit one requested the Commuter Airline flight schedules, and Exhibit two requested the transcript of the tape , which I believe was Exhibit 33-a, and it was sent into the Jury.

THE COURT: Is that agreeable to all parties?

MR. CHALENSKI: Agreeable to the Government.

MR. RICHARDS: Agreeable to me.

MR. SHANAHAN: Agreeable to me.

(Whereupon, the proceedings were recessed at 2:18 p.m., awaiting the verdict of the Jury.)

(Whereupon, at 3:55, a note was received from the Foreman of the Jury, and the following proceedings were held before the Court, all Counsel being present, in the absence of the Jury.)

THE COURT: We have a note from the Jury which reads as follows:

'Clarification of choice of representatives in counts two through nine.'

(Counsel recessed to the Judge's Chambers

and after agreement, the following note was sent to the Jury.)

'Your note was not clear. Please try to specify exactly what you want to know. Judge MacMahon.'

(Whereupon, at 4:05 p.m., the following took place before the Court, all Counsel being presence, in the absence of the Jury.)

THE COURT: This note says: 'Does choice of their representatives mean: 1- choice between different unions: 2- choice between union or non-union.'

I can answer that. Bring in the Jury.

(Whereupon, the following took place before the Court and the Jury.)

THE COURT: You may sit down. I have your note: 'Does choice of their representatives mean: 1- choice between different unions ; 2- choice between union or non-union.'

Choice of representative means that the employee has the right, either to choose a representative, or not to choose a representative. In other words, his choice of action, what he is going to do, either to refrain from choosing a union, or choosing a union cannot be interferred

with by the employer.

In other words, he has to leave him alone, as I told you in more detail in the Charge.

Now, I do not recall any evidence here about any quarrel between two different unions, but if you recall any such evidence, the answer to that question is the same: the employee can choose union A or B or not union A or not union B. The point is that he must be let free from interference by the employer in making his decision or his choice.

I think that answers your question. If it doesn't, come back.

(Whereupon, the Jury was again excused to continue their deliberation.)

(Whereupon, at 4:25 p.m., the Foreman informed the Court that a verdict had been reached and the following proceedings were held.)

THE COURT: Bring in the Jury.

(Whereupon, the Jury returned to the Jury Box.)

THE CLERK: Ladies and Gentlemen of the Jury, have you agreed upon a verdict, and if so, how do you find, and who shall say for you.

JUROR NO. 10 (RYAN): We have found

the defendants guilty of all charges.

THE CLERK: Harken to your verdict, Ladies and Gentlemen, as the Court has recorded it. You say that you find all of the Defendants guilty of all charges, and so say you all?

(Response by jurors in the affirmative.)

MR. SHANAHAN: I would like to ask that they be polled.

MR. RICHARDS: Yes.

THE COURT: Poll the Jury.

THE CLERK: As your name is called, please indicate your verdict.

William Calkins.

JUROR NO. 1 (CALKINS): Guilty.

THE CLERK: Catherine Kramer.

JUROR NO. 2 (KRAMER): Guilty on all counts.

THE CLERK: Frances Price.

JUROR NO. 3 (PRICE): Guilty.

THE CLERK: Joseph Shaw.

JUROR NO. 4 (SHAW): Guilty.

THE CLERK: Beverly Brooker.

JUROR NO. 5 (BROOKER): Guilty on all counts.

THE CLERK: Mary J. brown.

JUROR NO. 6 (BROWN): Guilty on all counts.

THE CLERK: Colomba Aramini.

JUROR NO. 7 (ARAMINI): Guilty.

THE CLERK: Max T. Wiant

JUROR NO. 8 (WIANT): Guilty on all counts.

THE CLERK: Patricia Gulini

JUROR NO. 9 (GUILINI): Guilty on all counts.

THE CLERK: Robert P. Ryan.

JUROR NO. 10 (RYAN): Guilty.

THE CLERK: Lester Day.

JUROR NO. 11 (DAY): Guilty.

THE CLERK: Kathleen J. Ryan.

JUROR NO. 12 (RYAN): Guilty.

THE COURT: I want to thank you very much for the careful attention that you gave to this case. It might interest you to know that so far as I am able to find out, from the books, you are the first jury, and I am the first judge to handle a criminal case under these laws. As far as I can see, this is probably the only criminal case in this law.

Usually the remedies are left to the appropriate labor board, but here I guess the parties or the authorities that control these things thought that this was a sufficiently flagrant case to warrant criminal prosecution and your verdict confirms their judgement.

You are excused now until Monday, morning at 9:45.

(Whereupon, the Jury was excused.)

MR. SHANAHAN: If the Court, please, I would like to ask that Your Honor refer to us the right to make appropriate motions at some later date, and get our thoughts together with reference to it.

THE COURT: Mr. Shanahan, I would appreciate them now, while the evidence is fresh in the mind.

At some later date, I am going to be very steeped in a lot of other work, and in current cases at that time, and it makes it awfully difficult for a Court to focus your points, in light of the evidence. I prefer that you do it now, if you can; that is not to say that I would not give you second thoughts, if you wished or feel that you must make a formal motion at a later time.

I am not a computer, and I cannot carry all of this in my head.

MR. SHANAHAN: I realize that, and of course, at this stage, without giving it any further thought, about all I can do would be to move to set aside the verdict as contrary to the evidence, and contrary to the law upon the rulings that were made by the Court throughout the trial, and the

the usual grounds to move to set aside a verdict, and perhaps if, within the next few days, we should desire to supplement that beyond that formal motion Your Honor might permit us to do that?

THE COURT: You have ten days, I think, if you wish to do that.

I will give you ten days in which to do it. But as of now, I deny the motions.

MR. RICHARDS: I would also make the same motion on behalf of the other defendants.

THE COURT: I deny it.

What is the bail status here?

MR. CHALENSKI: They have been released on their own recognizance, and I do not believe it will be necessary to change that.

THE COURT: The Defendants are continued on their own recognizance pending sentence, which I will set for Setpember 16th. Is that convenient, September 16th?

MR. SHANAHAN: As far as I know now, Your Honor.

THE COURT: It will be here in Auburn.

MR. CHALENSKI: Do you wish a pre-sentence investigation?

THE COURT: Yes, I want a pre-sentence report

MR. CHALENSKI: There was one Exhibit that was entered into evidence by the Government in this trial and that is Defendant's Exhibit Z.

May I have the Court's permission to make that document available to the Federal Bureau of Investigation?

THE COURT: Do you want to substitute a photostat in the record, is that what you want?

MR. CHALENSKI: Yes. May I do that? Well, I guess the best thing to do would be to substitute copies for all of the exhibits?

MR. RICHARDS: Well, the Clerk had mentioned to me earlier that at the termination of the trial he would like to have all of the exhibits because I think that he has to prepare some list, so I assume that all of the exhibits ought to go to the Clerk.

He isn't here right at the moment.

THE COURT: Well, certainly all exhibits ought to go to the Clerk. But do you have any quarrel with Mr. Chalenski's substituting photostats for the exhibits which have been received in evidence?

MR. RICHARDS: I have no objection.

MR. SHANAHAN: No.

THE COURT: That is all he wants to do, is

substitute some photostats for any or all of the exhibits in evidence. You may do that, if you wish to.

MR. CHALENSKI: Thank you, Your Honor.

THE COURT: Make sure that Counsel agrees that they are accurate copies, all right?

MR. CHALENSKI: Yes, Your Honor, thank you.

THE COURT: I suggest that you do that by written stipulation and file it with the Court.

MR. CHALENSKI: All right.

THE COURT: Along with your substituted photostats.

MR. CHALENSKI: All right, thank you.

THE COURT: Good afternoon.

THE CLERK: Court stands in recess until 10:00 o'clock tomorrow morning.

(Whereupon, Court was recessed at 4:35 p.m.)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

UNITED STATES OF AMERICA, :

Plaintiff-Appellee, : Docket No. 76-1436

v. :

JERRY WINSTON, BROOME COUNTY AVIATION, INC., COMMUTER AIRLINES INC., and THEODORE (TED) BELL, : CERTIFICATE OF SERVICE

Defendants-Appellants :

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARVIN WEXLER, being sworn, states:

I am an attorney associated with PAUL, WEISS, RIFKIND, WHARTON & GARRISON, attorneys for appellants herein. On March 24, 1977 a clerk employed by my firm personally served two copies of the attached Brief of the Defendants-Appellants, containing revised record references in accordance with Rules 30(c) and 31(b) of the Federal Rules of Appellate Procedure and in accordance with a Stipulation concerning the submission of a deferred Appendix, and also served two copies of the deferred Appendix (one copy of the exhibit volume) on Paul V. French, Esq., United States Attorney for the Northern

District of New York, Office of the United States Attorney for the Northern District of New York, United States Court House and Federal Building, 100 South Clinton Street, Syracuse, New York 13202.

Marvin Wexler

MARVIN WEXLER

Sworn to before me this
24th day of March, 1977.

Antoinette Scaffidi

ANTOINETTE SCAFFIDI
Notary Public, State of New York
No. 41-6778300 Queens County
Certificate filed in New York County
Commission Expires March 30, 1978